15380

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 168.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, PETITIONER,

vs.

ELIZA MAUD HILL, GEORGE E. HILL, ELLEN KELLOGG HILL, AND EUGENE C. HILL, BY HIS GUARDIAN AD LITEM, EBEN SMITH.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

PETITION FOR CERTIORARI FILED DECEMBER 13, 1902.
CERTIORARI AND RETURN FILED MARCH 23, 1903.

(18,746.)

(18,746.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 166.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, PETITIONER,

vs.

ELIZA MAUD HILL, GEORGE E. HILL, ELLEN KELLOGG HILL, AND EUGENE C. HILL, BY HIS GUARDIAN AD LITEM, EBEN SMITH.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

INDEX.

	Page
Transcript from the circuit court of the United States for the district of Washington	1
Mandate from Supreme Court of the United States	1
Order to file and record mandate	3
Amended complaint	4
Amended answer to amended complaint	12
Replication	34
Motion for leave to Geo. E. Hill and Ellen K. Hill to proceed in their own right instead of by guardian	45
Affidavit of Ellen K. Hill and Geo. E. Hill	46
Order granting leave to Geo. E. and Ellen K. Hill to proceed in their own right	47

Page.

Verdict ... 48
Motion for new trial ... 49
Order denying motion for new trial ... 51
Defendant's motion for judgment notwithstanding the verdict ... 52
Opinion of Hanford, J., filed January 23, 1902 ... 53
Stipulation extending time to file bill of exceptions ... 61
Order extending time to file bill of exceptions ... 62
Judgment ... 63
Bill of exceptions ... 65
Exception No. 1 ... 65
Statement ... 65
Plaintiffs' offers ... 66
Defendant's Exhibit No. 1—Stipulation as to testimony of certain witnesses on behalf of the defendant. 67
Plaintiffs' Exhibit "A"—Application for life insurance ... 70
"B"—Life insurance policy ... 77
"C"—Letter addressed to the secretary of the Mutual Life Ins. Co. of New York and signed by Eben Smith and David Kellogg ... 81
"D"—Letter addressed to Eben Smith and signed by H. E. Duncan, Jr. ... 82
Testimony of Eben Smith ... 82
Mrs. Eliza Maud Bowman ... 85
George E. Hill ... 86
Ellen Kellogg Hill ... 87
Eugene Cary Hill ... 88
Defendant's offers ... 90
Defendant's Exhibit No. 3—Appointment of agent ... 92
No. 4—Copy of charter and amendments ... 93
Testimony of James Forman ... 102
Defendant's Exhibit No. 5—Letter dated Victoria, B. C., April 30, 1886, addressed to A. B. Forbes and signed by H. F. Heisterman & Co. ... 105
No. 6—Letter dated Victoria, B. C., May 29, 1886, addressed to A. B. Forbes and signed by H. F. Heisterman & Co. ... 107
No. 7—Letter dated Victoria, B. C., June 15, 1886, addressed to A. B. Forbes and signed by H. F. Heisterman & Co. ... 109
Testimony of Howard H. Lewis ... 110
Defendant's Exhibit No. 8—Letter dated Seattle, W. T., May 31, 1887, addressed to A. B. Forbes and signed by Turner & Lewis ... 113
No. 9—Letter dated Seattle, W. T., July 8, 1887, addressed to A. B. Forbes and signed by Turner & Lewis ... 114
Testimony of A. B. Forbes ... 118

Page.

Defendant's Exhibit No. 10—Letter dated New York, May 13, 1886, addressed to A. B. Forbes and signed by W. E. Easton. 124
No. 11—Letter dated May 15, 1886, addressed to H. F. Heisterman & Co. and signed by A. B. Forbes. 126
No. 12—Letter dated May 20, 1886, addressed to H. F. Heisterman & Co. and signed by A. B. Forbes 127
No. 13—Letter dated June 3, 1887, addressed to Turner & Lewis and signed by A. B. Forbes 128
No. 14—Letter dated June 6, 1887, addressed to Turner & Lewis and signed by A. B. Forbes 129
Testimony of James Forbes (recalled) 134
Offers of exhibits, &c. 135
Testimony of Sherwood Gillespy 139
Testimony closed 149
Motion for verdict for plaintiff 150
Motion for verdict for defendant 151
Exception No. 2 156
Instruction No. I refused 156
Exception No. 3 157
Instruction No. II refused 157
Exception No. 4 158
Instruction No. III refused 158
Exception No. 5 159
Instruction No. IV refused 159
Exception No. 6 160
Instruction No. V refused 160
Exception No. 7 161
Instruction No. VI refused 161
Exception No. 8 162
Instruction No. VII refused 162
Exception No. 9 163
Instruction No. VIII refused 163
Exception No. 10 163
Instruction given 163
Exception No. 11 163
Instruction given 164
Exception No. 12 164
Instruction given 164
Exception No. 13 164
Motion for new trial refused 164
Exception No. 14 164
Charge of court to jury 165
Stipulation as to bill of exceptions 169
Judge's certificate to bill of exceptions 170

Page.
Petition for writ of error 171
Assignment of errors 173
Order allowing writ of error 184
Supersedeas bond 185
Clerk's certificate 188
Writ of error 189
Citation 192
Order of submission 195
Opinion 196
Judgment 206
Order staying mandate 207
Clerk's certificate 208
Writ of certiorari 209
Stipulation as to return 209
Return to writ of certiorari 211

Mandate.

UNITED STATES OF AMERICA—ss.

The President of the United States of America, to the Honorable the Judges of the Circuit Court of the [Seal] United States for the District of Washington, Greeting:

Whereas, lately in the United States Circuit Court of Appeals for the Ninth Circuit, in a cause between The Mutual Life Insurance Company of New York, plaintiff in error, and George E. Hill, Ellen Kellogg Hill, Eugene C. Hill, by their guardian, Eben Smith, and Eliza Maud Hill, in her own behalf, defendants in error, wherein the judgment of the said Circuit Court of Appeals, entered in said cause on the 2d day of October, A. D. 1899, is in the following words, viz.:

"This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Washington, Northern Division, and was argued by counsel;

"On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said Circuit Court in this cause be, and the same is hereby, affirmed with costs."

As by the inspection of the transcript of the record of the said United States Circuit Court of Appeals, which was brought unto the Supreme Court of the United States by virtue of a writ of certiorari agreeably to the act of

Congress, in such case made and provided, fully and at large appears.

And whereas, in the present term of October, in the year of our Lord one thousand eight hundred and ninety-nine, the said cause came on to be heard before the said Supreme Court on the said transcript of record, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said United States Circuit Court of Appeals, and the judgment of the Circuit Court of the United States for the District of Washington in this cause be, and the same are hereby, reversed with costs; and that the said plaintiff in error, The Mutual Life Insurance Company of New York, recover against the said defendants in error one hundred and twenty-nine dollars and thirty-five cents for its costs herein expended and have execution therefor.

And it is further ordered that this cause be, and the same is hereby, remanded to the Circuit Court of the United States for the District of Washington, with directions to overrule the demurrer to defendant's answer.

May 28, 1900.

You, therefore, are hereby commanded that such execution and further proceedings be had in said cause, in conformity with the opinion and judgment of this Court as according to right and justice, and the laws of the United States, ought to be had, the said writ of certiorari. notwithstanding.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the United States, the fourth day of June,

in the year of our Lord one thousand nine hundred.

JAMES H. McKENNEY,

Clerk of the Supreme Court of the United States.

Costs of Plaintiff in Error.

Clerk	$ 61.35
Printing Record	48.00
Attorney	20.00
	$129.35

[Endorsed]: Mandate. Filed in the United States Circuit Court, District of Washington, October 12, 1900. A. Reeves Ayres, Clerk. H. M. Walthew, Deputy.

October 12, 1900.

General Order Book, Circuit Court, volume 6, page 405.

GEORGE E. HILL et al.

vs. No. 511.

THE MUTUAL LIFE INS. CO. OF NEW YORK.

Order to File and Record Mandate.

Now, on this day, upon motion of Struve, Allen, Hughes & McMicken, it is ordered by the Court that the mandate in the above-entitled cause be filed and spread at large upon the records of this court.

In the Circuit Court of the United States, District of Washington, Northern Division.

GEORGE E. HILL, ELLEN KELLOGG HILL, EUGENE C. HILL, by Their Guardian, EBEN SMITH and ELIZA MAUDE HILL, in Her Own Behalf,
Plaintiffs,
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Defendant.
No. 511.

Amended Complaint.

Come now the above-named plaintiffs, by their attorneys, and for a cause of action against the above-named defendant, complain and allege:

First.

That the above-named plaintiffs, George E. Hill, Ellen Kellogg Hill, and Eugene C. Hill are each of them under the age of twenty-one years.

Second.

That on the 7th day of April, 1888, at Seattle, territory of Washington, now State of Washington, the above-named Eben Smith was duly appointed by the District Court of the then territory of Washington, now State of Washington, district guardian of the property and person

of George E. Hill, Ellen Kellogg Hill and Eugene C. Hill, and thereupon said Eben Smith qualified as such guardian, and he has ever since been and now is the duly appointed, qualified, and acting guardian of the property and persons of George E. Hill, Ellen Kellogg Hill and Eugene C. Hill.

Third.

That said George E. Hill, Ellen Kellogg Hill, Eugene C. Hill, Eliza Maude Hill, and Eben Smith are each and all of them, and during all the times herein have been, residents, citizens, and inhabitants of the State of Washington.

Fourth.

That the defendant, The Mutual Life Insurance Company, is a corporation duly organized, acting, and existing and under and by virtue of the laws of the State of New York, with its principal office and place of business in the city of New York, State of New York.

Fifth.

That on or about the 29th day of April, 1886, said defendant, in consideration of the sum of eight hundred and fourteen dollars ($814) to it in hand paid by one George Dana Hill, made, executed, and delivered in the city of New York, State of New York, a certain contract or policy of insurance hereinafter set forth, whereby it insured the life of said George Dana Hill in the sum of twenty thousand dollars ($20,000). That said defendant in said contract agreed to pay Ellen Kellogg Hill, if living, and if not living, then to such of the children of their bodies

(the bodies of said George D. and Ellen Kellogg Hill), as shall be living at the death of said Ellen Kellogg Hill, or their guardian for their use, upon acceptance of satisfactory proof of the death of said George Dana Hill, the full sum of twenty thousand dollars ($20,000). That said contract or policy of insurance is in words and figures as follows, to wit:

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

No. 281, 470 A.

Age 46 years. Amount $20,000.

In consideration of the application for this policy, which is hereby made a part of this contract, The Mutual Life Insurance Company of New York promises to pay at its home office in the city of New York, unto Ellen Kellogg Hill, wife of George Dana Hill of Seattle, in the county of King, Washington territory, for her sole use, if living, in conformity with the statute, and if not living, to such of the children of their bodies as shall be living at the death of the said wife or to their guardian, for their use, twenty thousand dollars ($20,000), upon acceptance of satisfactory proofs at its said office, of the death of the said George Dana Hill during the continuance of this policy, upon the following condition; and subject to the provisions, requirements, and benefits stated on the back of this policy which are hereby referred to and made part hereof:

The annual premium of eight hundred and fourteen dollars ($814.00), shall be paid in advance on the delivery of this policy, and thereafter to the company at its home

office in the city of New York, on the twenty-ninth day of April in every year during the continuance of this contract.

In witness whereof, the said The Mutual Life Insurance Company of New York has caused this policy to be signed by its president and secretary, at its office in the city of New York, the twenty-ninth day of April, A. D. one thousand eight hundred and eighty-six.

RICHARD A. McCURDY,
President.

W. J. EASTON,
Secretary.

PROVISIONS, REQUIREMENTS, AND BENEFITS.

Payment of Premiums.—Each premium is due and payable at the home office of the company in the city of New York, but will be accepted elsewhere when duly made in exchange for the company's receipt, signed by the president or secretary. Notice that each and every such payment is due at the date named in the policy is given and accepted by the delivery and acceptance of this policy, and any further notice required by any statute is thereby expressly waived. That part of the year's premium, if any, which is not due and is unpaid at the maturity of this contract, shall be deducted from the amount of the claim. If this policy shall become void by nonpayment of premium, all payments previously made shall be forfeited to the company except as hereinafter provided.

Dividends.—This policy is issued on the five-year distribution plan. It will be credited with its distributive

share of surplus, apportioned at the expiration of each five years from the date of issue. Only policies in force at the end of such terms, and entitled thereto by year of issue shall share in such distribution of the surplus; and no other distribution to such policies shall be made at any other time. All surplus so apportioned may be applied at the end of such periods to purchase additional insurance, or in payment of future premiums on this policy, if requested in writing, or may then be drawn in cash.

Paid-up Policy.—After three full annual premiums have been paid upon this policy, the company will, upon the legal surrender thereof before default in payment of any premium, or within six months thereafter issue a paid-up policy, payable as herein provided, for the amount required by the provisions of the act of May 21, 1879, chap. 347, Laws of the State of New York.

Surrender.—This policy may be surrendered to the company at the end of the fifth year from the date of issue, and eighty per cent of the reserve computed by the American table of mortality, and four and one-half per cent interest, and the surplus as defined above will be paid therefor. If surrendered at the end of the second, or of any subsequent five-year period, the full reserve by the same standard and the surplus as defined will be paid. No cash value will be paid for a surrender at any other time or date.

NOTICE.

Powers of Agents.—No agent has power on behalf of the company to make or modify this or any contract of insurance, to extend the time for paying a premium, to

bind the company by making any promise, or by receiving any representation or information not contained in the application for this policy.

Assignments.—The company declines to notice any assignment of this policy until the original or a duplicate or a certified copy thereof shall be filed in the company's home office. The company will not assume any responsibility for the validity of an assignment.

That the first annual premium of eight hundred and fourteen dollars ($814) was paid to said defendant company on the delivery thereof to said George Dana Hill, by said George Dana Hill.

Sixth.

That the application referred to is not in the hands of plaintiffs, but is in the hands and possession of defendant, and plaintiffs cannot set forth a copy thereof, but plaintiffs allege that said application contained the following agreement and words: "And it is agreed that there shall be no contract of insurance until a policy shall have been delivered and issued by said company, and the first premium thereon paid while the person proposed for insurance is in the same condition of health described in this application; and that if said policy be issued the declarations, agreements, and warranties herein contained shall be a part hereof; and the contract of insurance when made shall be held and construed at all times and places to have been made in the city of New York."

Seventh.

Said Ellen Kellogg Hill mentioned in said contract above set forth died February 14, 1887, in the city of Seattle, territory of Washington, now State of Washington. Said Ellen Kellogg Hill died prior to said George Dana Hill.

Eighth.

Said George Dana Hill, insured, died on the 4th day of December, 1890.

Ninth.

Said Eliza Maud Hill, George E. Hill, Ellen Kellogg Hill and Eugene C. Hill were children of the bodies of said Ellen Kellogg Hill and George Dana Hill, and were living at the time of the death of said Ellen Kellogg Hill.

Tenth.

Said Eliza Maud Hill, George E. Hill, Ellen Kellogg Hill, and Eugene C. Hill were the only children of the bodies of said Ellen Kellogg Hill and George Dana Hill at the time of the death of said Ellen Kellogg Hill.

Eleventh.

That on the 23d day of December, 1890, the defendant was notified of the death of said George Dana Hill, and requested to furnish plaintiffs necessary blanks in order that plaintiffs might furnish proofs of death as required by the rules and regulations of defendant company.

Twelfth.

That on the 3d day of February, 1891, said defendant, in reply thereto, informed and declared to said plaintiffs

that said contract or policy of insurance above set forth had been forfeited by the nonpayment of a premium.

That said defendant thereby waived the right to claim any other or any proofs of the death of said George Dana Hill.

Thirteenth.

That said George Dana Hill, during his lifetime and the plaintiffs', at all times duly performed all the conditions of said contract necessary by him to be performed.

Fourteenth.

That the defendant has wholly failed to pay to plaintiffs said policy of insurance or said sum of twenty thousand dollars ($20,000), or any part thereof.

Wherefore, plaintiffs pray for judgment against said defendant in the sum of twenty thousand dollars ($20,000) with interest thereon at the rate of six per cent per annum from the 3d day of January, 1891, together with costs and disbursements in this action.

SMITH & LITTELL,
STANTON WARBURTON,
Attorneys for Plaintiffs.

State of Washington, }
County of King. } ss.

Eben Smith, being first duly sworn, on oath deposes and says: That he is the Eben Smith above named as one of the plaintiffs in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof, and that he believes the same to be true.

EBEN SMITH.

Subscribed and sworn to before me this 19th day of October, 1895.

THOMAS T. LITTELL,

Notary Public, Residing at Seattle, King County, State of Washington.

[Endorsed]: Amended Complaint. Filed October 19, 1895. In the United States Circuit Court. A Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

In the Circuit Court of the United States, District of Washington, Northern Dirision.

GEORGE E. HILL, ELLEN KELLOGG HILL, EUGENE C. HILL, by Their Guardian, EBEN SMITH, and ELIZA MAUD HILL, in Her Own Behalf,
Plaintiffs,
vs.
THE MUTUAL LIFE INSURANNCE COMPANY of New York,
Defendants.
} No. 511.

Amended Answer to Amended Complaint.

Comes now the above-named defendant, with the leave of Court first obtained, and makes amended answer to the amended complaint herein as follows:

I.

For answer to paragraph I of said amended complaint, defendant denies that the said Eliza Maude Hill is under

the age of twenty-one years or under the age of twenty-seven years; denies that said George E. Hill is under the age of twenty-one years or under the age of twenty-three years; denies that said Ellen Kellogg Hill is under the age of nineteen years; denies that said Eugene C. Hill is under the age of seventeen years.

II.

For answer to paragraph II of said complaint admits that said Eben Smith was appointed and qualified as the guardian of the personal property of said George E. Hill and Ellen Kellogg Hill and Eugene C. Hill, and continued to act as the guardian of said persons during their minority, but as to whether the said Eben Smith continues as the guardian of the persons and property of any of said persons after they had attained the age of twenty-one years, this defendant denies that it has any knowledge or information sufficient to form a belief.

III.

For answer to paragraph V of said amended complaint, the defendant, Mutual Life Insurance Company, a corporation, denies so much of said paragraph as alleges that this defendant made or delivered the said contract therein mentioned in the city or State of New York, or at any place other or outside of the State of Washington; denies that the consideration of said contract was other than is stated in said contract, and denies that the said alleged consideration of eight hundred and fourteen dollars was paid by the said George Dana Hill or anyone on his behalf to this defendant at any other place than in the

city of Seattle and territory (now State) of Washington; but avers that the said premium of eight hundred and fourteen dollars was paid by the said George Dana Hill to this defendant in the city of Seattle, and that at the same time and place the said policy of insurance was by defendant delivered to said Hill and became a contract.

IV.

For answer to paragraph XI of said amended complaint, defendant denies the same and each and every allegation therein contained.

V.

For answer to paragraph XII of said amended complaint, defendant admits that on or about the 3d day of February, 1891, it informed and declared to said plaintiffs that the said contract or policy of insurance had been lapsed and terminated by nonpayment of premium, but denies each and every other allegation in said paragraph contained.

VI.

For answer to paragraph XIII of said amended complaint, defendant denies that the said George Dana Hill during his lifetime duly or at all performed all or any of the conditions of the said contract necessary or required by him to be performed, or conditioned or mentioned in said contract of insurance to be performed by him; denies that the said George Dana Hill on the 29th day of April, A. D. 1887, or at any other time, ever paid or caused to be paid any part of the annual premium of eight hundred and fourteen dollars by the terms of said policy to be

paid by him, and denies that the said annual premium of eight hundred and fourteen dollars falling due on said 29th day of April, 1887, or any part of it, ever was paid by the said George Dana Hill or anyone on his behalf, or at all, either during the lifetime of said George Dana Hill or since his death, and denies that any annual payment of premium or part of premium mentioned in said contract or policy of insurance ever has been paid, save and except the first annual premium paid upon the delivery of said policy in the year 1886.

By way of a first and affirmative answer and defense to the said amended complaint, defendant alleges as follows:

I.

That the defendant, Mutual Life Insurance Company of New York, was at all the times mentioned in the amended complaint and at all the times herein mentioned, and is, a corporation duly chartered and created by the legislature of the State of New York, and existing under and by virtue of the laws of the said State, and is and was at all of said times engaged in transacting a life insurance business in the territory (now State) of Washington, under and by virtue of and in pursuance of the laws of the territory (now State) of Washington, with its principal office for the transaction of business in said State and territory at the city of Seattle.

II.

That on or about the 28th day of April, A. D. 1886, one George Dana Hill, being the same George Dana Hill named in the amended complaint, and who was at all the

times herein mentioned a citizen and resident of the territory (now State) of Washington, made, signed and delivered to the defendant at its office in said city of Seattle, territory of Washington, his written application to this defendant for a policy of life insurance upon his life in the sum of twenty thousand dollars which application became and was pursuant to its own terms a part of said policy and of the contract of insurance evidenced thereby.

III.

That the said application contains, among other things, a stipulation and condition to the following effect:

"And it is agreed that there shall be no contract of insurance until a policy shall have been issued and delivered by the said company and the first premium thereon paid while the person proposed for insurance is in the same condition of health described in said application."

IV.

That thereupon the agent of defendant in Seattle aforesaid transmitted said application of the said George Dana Hill to the agent of the defendant in San Francisco, by whom said application was transmitted to the defendant in the city and State of New York.

V.

That thereafter, to wit, on the 29th day of April, 1886, the defendant, pursuant to said application, transmitted the policy of insurance described in said amended complaint to its said agent at San Francisco, California, and thereafter, to wit, on the 10th day of May, 1886, the agent of the defendant at San Francisco aforesaid transmitted

the said policy of insurance to the agent of the defendant in Seattle aforesaid for delivery of the same to the said George Dana Hill provided the said George Dana Hill should pay to the defendant at Seattle the premium due upon said policy, and said last-named agent of the defendant in Seattle aforesaid on or about the 15th day of May, 1886, delivered the said policy to the said George Dana Hill and the said George Dana Hill at the said time and place paid to defendant the first premium due upon said policy.

VI.

That it was provided in said policy of insurance mentioned in said amended complaint, as a condition thereof, as follows:

"The annual premium of eight hundred and fourteen dollars shall be paid in advance on the delivery of this policy, and thereafter to the company, at its home office in the city of New York, on the 29th day of April, in every year during the continuance of this contract."

And it was therein further provided as a condition of said contract, as follows to wit:

"Each premium is due and payable at the home office of the company in the city of New York, but will be accepted elsewhere when duly made in exchange for the company's receipt signed by the president or secretary. Notice that each and every such payment is due at the date named in the policy, is given and accepted by the delivery and acceptance of this policy and any further notice required by any statute is thereby expressly waived That part of the year's premium, if any, which is not due

and is unpaid at the maturity of this contract shall be deducted from the amount of the claim. If this policy shall become void by nonpayment of premium, all payments previously made shall be forfeited to the company except as hereinafter provided."

VII.

That pursuant to the conditions of the said policy there became and was due to the defendant as a premium upon the said policy of insurance upon the 29th day of April, A. D. 1887, the sum of eight hundred and fourteen dollars, and the said George Dana Hill and the said Ellen Kellogg Hill, his wife, and each and all of the plaintiffs herein failed, neglected, and refused to pay to the defendant at the time aforesaid the said sum of eight hundred and fourteen dollars, or any part thereof, and ever since said time and up to the time of the death of the said George Dana Hill, on the 4th day of December, 1890, the said George Dana Hill and the said Ellen Kellogg Hill, his wife, during her lifetime, and each and all of the plaintiffs failed, neglected, and refused to pay to defendant the said sum or any part thereof, or any other sum or thing of value whatsoever, and by reason thereof the said policy of insurance lapsed and terminated and became void and of no effect.

By way of a second and further affirmative answer and defense to the amended complaint, defendant alleges as follows:

I.

That the defendant, Mutual Life Insurance Company of New York, was at all the times mentioned in the

amended complaint and at all the times herein mentioned, and is, a corporation duly chartered and created by the legislature of the State of New York and existing under and by virtue of the laws of said State, and is and was at all of said times engaged in transacting a life insurance business in the territory (now State) of Washington, under and by virtue of and in pursuanec of the laws of the territory (now State) of Washington, with its principal office for the transaction of business in said State and territory at the city of Seattle.

II.

That on or about the 28th day of April, A. D. 1886, one George Dana Hill, being the same George Dana Hill named in the amended complaint, and who was at all times herein mentioned a citizen and resident of the territory (now State) of Washington, made, signed and delivered to the defendant at its office in said city of Seattle, territory of Washington, his written application to this defendant for a policy of life insurance upon his life in the sum of twenty thousand dollars, which application became and was pursuant to its own terms, a part of said policy and of the contract of insurance evidenced thereby.

III.

That said application contains, among other things, a stipulation and condition to the following effect:

"And it is agreed that there shall be no contract of insurance until a policy shall have been issued and delivered by the said company, and the first premium thereon paid while the person proposed for insurance is

in the same condition of health described in said application."

IV.

That pursuance of said application defendant made its policy of insurance, being that in the amended complaint mentioned, and at Seattle, Washington, in exchange for payment of said premium of eight hundred and fourteen dollars, there delivered the said policy of insurance to the said George Dana Hill.

V.

That it was provided in said policy of insurance mentioned in said amended complaint as a condition thereof, as follows:

"The annual premium of eight hundred and fourteen dollars shall be paid in advance on the delivery of this policy, and thereafter to the company, at its home office in the city of New York, on the 29th day of April, in every year during the continuance of this contract."

And it was therein further provided as a condition of said contract as follows, to wit:

"Each premium is due and payable at the home office of the company, in the city of New York, but will be accepted elsewhere when duly made in exchange for the company's receipt signed by the president or secretary. Notice that each and every such payment is due at the date named in the policy, is given and accepted by the delivery and acceptance of this policy, and any further notice required by any statute is thereby expressly waived. That part of the year's premium, if any, which is

not due and is unpaid at the maturity of this contract shall be deducted from the amount of the claim. If this policy shall become void by nonpayment of premium, all payments previously made shall be forfeited to the company except as hereinafter provided."

VI.

That pursuant to the conditions of said policy there became and was due to defendant as a premium upon said policy of insurance on the 29th day of April, 1887, the sum of eight hundred and fourteen dollars. That the said George Dana Hill defaulted in the payment of said premium and the whole thereof and continued in said default during his lifetime and wholly neglected, omitted and failed to pay said premium and every part thereof; that on account of the said neglect and failure and default of said George Dana Hill, and in pursuance of the terms of said policy, this defendant, shortly after the said 29th day of April, 1887, entered the said policy upon its books as lapsed and terminated, and at all times subsequent to said April 29th, 1886, treated the said contract as lapsed, terminated and void; that at no time subsequent to the said 29th day of April, 1887, did the said George Dana Hill or anyone on his behalf apply to this defendant, or in any manner ask or seek to have said policy restored, but, on the contrary, at all times acquiesced in the said lapsing and termination of the said contract, as the same was entered and treated by this defendant, and at no time did he, the said George Dana Hill or anyone on his behalf, or on behalf of his said wife, or on behalf of any of said plaintiffs, ever offer to pay any premium on said policy

subsequent to the first annual premium for the year 1886 paid as aforesaid upon the delivery thereof, and that nothing whatever during the lifetime of the said George Dana Hill was paid or offered to be paid to defendant upon said contract or policy of insurance subsequent to said first annual premium, and by reason of the said premises the said George Dana Hill wholly abandoned the said contract.

And by way of a further third affirmative answer and defense to the matters in the amended complaint set forth, defendant alleges:

I.

That at all the times hereinafter mentioned it was and is a corporation duly chartered and created by the legislature of the State of New York as a mutual life insurance society, association, or corporation, and during all of said times has been and is engaged in the business of a mutual life insurance society or association. That the membership of said corporation consists of its holders of policies of life insurance; that the funds out of which and by means of which its business as such life insurance society or association is conducted and out of which damages and losses are to be paid, arise out of the earnings in its business as such mutual life insurance society or association and the premiums due upon the policies of life insurance issued by it, and at the times herein mentioned, under and by virtue of and in pursuance of the laws of the territory (now State) of Washington, it has been engaged in transacting its life insurance business in the said territory (now State), having its principal

office for the transaction of business in said State at the city of Seattle therein.

II.

That on or about the 28th day of April, 1886, one George Dana Hill, being the same George Dana Hill mentioned in the amended complaint and who was at all the times herein mentioned a citizen and resident of the territory (now State) of Washington, signed and delivered at defendant's office in Seattle aforesaid, his written application to defendant for a policy of life insurance upon his life in the sum of twenty thousand dollars, which application was a part of the policy hereinafter mentioned and the contract of insurance evidenced thereby.

III.

That the said application contained among other things a stipulation and condition to the following effect:

"And it is agreed that there shall be no contract of insurance until a policy shall have been issued and delivered by the said company, and the first premium thereon paid while the person proposed for insurance is in the same condition of health described in said application."

IV.

That thereafter and about the 15th day of May, 1886, defendant upon the said application made its said policy of insurance upon the life of the said George Dana Hill and on said day, at Seattle, Washington, upon the payment to the said defendant by said George Dana Hill of eight hundred and fourteen dollars at said Seattle, there delivered to

said George Dana Hill a policy of insurance upon his life in the sum of twenty thousand dollars, being the policy in the amended complaint mentioned, and the said George Dana Hill thereby became a member of the said mutual life insurance society or association of this defendant.

V.

That it was provided in said policy of insurance as a condition thereof as follows:

"The annual premium of eight hundred and fourteen dollars shall be paid in advance on the delivery of this policy, and thereafter to the company, at its home office in the City of New York, on the 29th day of April, in every year during the continuance of this contract."

And it was therein further provided as a condition of said contract, as follows, to wit:

"Each premium is due and payable at the home office of the company, in the city of New York, but will be accepted elsewhere when duly made in exchange for the company's receipt signed by the president or secretary. Notice that each and every such payment is due at the date named in the policy, is given and accepted by the delivery and acceptance of this policy and any further notice required by any statute is thereby expressly waived. That part of the year's premium, if any, which is not due and is unpaid at the maturity of this contract shall be deducted from the amount of the claim. If this policy shall become void by nonpayment of premium, all payments previously made shall be forfeited to the company except as hereinafter provided."

VI.

That pursuant to the conditions of the said policy there became and was due to the defendant as a premium upon said policy of insurance on the 29th day of April, A. D. 1887, the sum of eight hundred and fourteen dollars, and the said George Dana Hill and the said Ellen Kellogg Hill, his wife, and each and all of the plaintiffs herein neglected, failed and refused to pay to the defendant at the time aforesaid said sum of eight hundred and fourteen dollars or any part thereof, and have ever since that time continued so to neglect, fail and refuse to pay the same and every part thereof, and did, up to the date of the death of the said George Dana Hill on the 4th day of December, 1890, continue to fail, neglect, and refuse to pay the said premium, or any part thereof, or any premium or any part of any premium subsequently to become due upon said policy, and have never paid or offered to pay any premium, or any part of any premium upon said policy of insurance, save and except the first annual payment for the year 1886; that during all of said times this defendant had insured the lives of many persons and had outstanding large numbers of policies, and during all of said times its membership consisted of many thousand persons, whose lives were insured by this defendant in various sums of money, and that during all of said times, for the purpose of successfully carrying on its said business of mutual life insurance and meeting its liabilities and discharging its duties to its members, it became and was necessary for every member of said association to make payment of his or her premiums,

and also to make payment of the same as they respectively fell due, and that by reason of the said neglect, failure, and refusal of the said George Dana Hill and his said wife, Ellen Hill, and the said plaintiffs to make payment of the premiums upon the said policy as the same became due, the said policy became lapsed, terminated and void, and the said plaintiffs and each of them are by reason of the said premises estopped from claiming the said policy is an existing contract, and from claiming any right of recovery thereon by reason of the death of George Dana Hill.

By way of a fourth affirmative defense to the matters in the amended complaint pleaded, defendant alleges:

I.

That at a time more than one year from the time of the issuance of the policy mentioned in the complaint, and more than one year from the said 29th day of April, 1886, and during the lifetime of the said George Dana Hill mentioned in the amended complaint, it was mutually agreed between the defendant and the said George Dana Hill that the said contract of insurance should be waived, abandoned, and rescinded and the said George Dana Hill and this defendant then and there by mutual consent waived, abandoned, and rescinded the said policy or contract of insurance accordingly and all their rights and obligations therein and thereunder.

By way of a further and fifth affirmative defense to the matters in the amended complaint pleaded, defendant alleges:

I.

That it was a corporation chartered and created by the legislature of the State of New York as a mutual life insurance association or society, and during such times was and is engaged in the mutual life insurance business, among other places in the State of Washington, and has complied with the laws of said State respecting foreign corporations transacting business therein, and during all the times herein mentioned had an office and principal place for transacting business in the city of Seattle in the territory (now State) of Washington.

II.

That on the 28th day of April, A. D. 1886, one George Dana Hill, being the same George Dana Hill named in the amended complaint, who was at all the times herein mentioned a citizen and resident of the territory (now State) of Washington, made, signed and delivered to the defendant at its office in Seattle aforesaid, his written application to defendant for a policy of life insurance upon his life in the sum of twenty thousand dollars, which application became and was, pursuant to its terms and the terms of the policy of insurance hereinafter mentioned, a part of said policy and of the contract evidenced thereby.

III.

That said application contained among other things a stipulation and condition to the following effect:

"And it is agreed that there shall be no contract of insurance until a policy shall have been issued and delivered

by the said company, and the first premium thereon paid while the person proposed for insurance is in the same condition of health described in said application."

IV.

That in pursuance of said application this defendant made its policy of life insurance, being the one in the amended complaint mentioned, and caused the same to be transmitted to said city of Seattle, and there, on or about the 15th day of May, 1886, through its agent at said Seattle, received from said George Dana Hill the first premium of eight hundred and fourteen dollars upon said policy and then and there delivered the said policy to said George Dana Hill, which then and there for the first time became an existing contract between said Hill and this defendant.

V.

That during all the times subsequent to the date of said policy and down to the death of said George Dana Hill which occurred December 4th, 1890, the said George Dana Hill was a citizen of said territory and State of Washington, and during all of said times was a resident of said city of Seattle in said territory and State and not elsewhere, and during all of said times the only postoffice address of the said George Dana Hill known to this defendant was at said city of Seattle in said territory (now State) of Washington.

VI.

That on the 29th day of April, 1887, in writing, and also personally, through its agent at Seattle, defendant

notified and informed the said George Dana Hill that the said premium of eight hundred and fourteen dollars necessary to be paid on said policy for a continuance thereof, was due and payable, and the defendant demanded the payment of said premium in said sum, and at said time and place, to wit, at said Seattle, tendered the receipt of this defendant therefor, duly signed by its president and secretary, and the said Hill being so fully advised and informed in the premises refused to make payment of the said premium or any part of it, and then and there intending for the purpose of inducing defendant to rely upon his said refusal, informed defendant that he, the said George Dana Hill, was unable to pay said premium, and did not intend to make payment thereof or of any premium thereafter to accrue on said policy of insurance, but, on the contrary, intended to allow the said policy to lapse and become terminated and void for want of payment of said premium or any future premium accruing on said policy, and the said defendant then and there, and ever since, relying upon the said representations and conduct of the said George Dana Hill, was thereby induced to and did declare the said policy terminated and abandoned, and in good faith relying upon the said conduct and representations upon the part of the said George Dana Hill, this defendant was induced to and did fail and abstain from giving or mailing or attempting to mail or give any further notice or demand whatsoever upon the said Hill for payment of premium upon the said policy, and did fail and abstain from giving any notice to any of said plaintiffs on account thereof, or to any

person interested in the said policy concerning the payment of any premium thereon.

By way of a further and sixth affirmative defense to the matters in the amended complaint pleaded, defendant alleges:

I.

That at all the times hereinafter mentioned it was and is a corporation chartered and created by the legislature of the State of New York as a mutual life insurance association or society, and during such times has been and is engaged in the business of a mutual life insurance society or association. That the membership of said corporation consists of its holders of policies of life insurance, making payment of the premiums on their respective policies, at the times therein stipulated and provided, and that the funds out of which and by means of which the business of said society or association is chiefly conducted and out of which its liabilities and losses are to be paid, arise from the earnings in its business as such mutual life insurance society or association, and the premiums due upon the policies of life insurance issued by it.

II.

That on the 31st day of December in each and every year it heretofore has and does ascertain the amount of its liabilities, and that such liabilities depend upon the policies issued by defendant in force; that defendant makes such ascertainment of liabilities and makes statements thereof to its policy holders for their information,

benefit and protection. That the liabilities of defendant depend upon its policies in force, and upon which premiums are paid. That neither the said George Dana Hill nor anyone on his behalf ever paid the premium of eight hundred and fourteen dollars or any part of said premium upon the policy in the amended complaint pleaded, falling due April 29th, 1887, and that by reason of the failure, neglect and default in making payment of said premium or any part thereof, this defendant caused the said policy to be entered upon its records as lapsed and terminated, and did not include the said policy as a liability in its ascertainment and statement to its policy holders, and never since said time has included or reported said policy as among its liabilities; that the policy holders meeting the conditions of their respective policies in the payment of premiums as they fall due, have at all such times acted upon the faith of said statement of liabilities, and persons becoming members of defendant and taking policies since the 29th day of April, 1887, have also been requested to and have relied upon the correctness of such statement of liabilities, and all said persons so acting have been induced to and have believed the said Hill policy lapsed and terminated as above stated, and that the same has not since the 29th day of April, 1887, and does not constitute a liability of defendant. That nothing whatever was or ever has been paid or offered to be paid by any person whomsoever or at all, on account of said policy, save and except the first annual premium of eight hundred and fourteen dollars paid upon the delivery thereof at Seattle, Washington, in 1886; that the

larger portion of said sum was absorbed and expended in the payment of fees and commissions of agents, examiners and office expenses pertaining to the obtaining and issuing of said policy; that said eight hundred and fourteen dollars purchased one year's insurance upon the life of said George Dana Hill, which expired April 29th, 1887, and that there never was in fact or in equity any balance or credit by way of surplus, accretion, reserve or otherwise due or owing upon said policy or to the said insured or any of said plaintiffs; and defendant alleges that to allow recovery on said policy which has not contributed in any manner to the reserve fund of defendant to meet its liabilities, tends to the disorganization and destruction of defendant's insurance business, and is inequitable to all of defendant's policy holders, and by reason of said premises plaintiffs should be estopped from any recovery in this action.

Wherefore defendant asks judgment that it be dismissed with its costs.

EDWARD LYMAN SHORT,
R. C. STRUDWICK,
STRUVE, ALLEN, HUGHES & McMICKEN,
Attorneys for Defendant.

United States of America,
District of Washington, } ss.
County of King.

Sherwood Gillespy, being first duly sworn on oath says: That he is the general agent for the State of Washington of the defendant in the above-entitled action, authorized

by it to solicit insurance in said State, and that he makes this affidavit in verification of the foregoing answer on behalf of said defendant; that he has read said answer, knows the contents thereof and believes the same to be true.

SHERWOOD GILLESPY.

Subscribed and sworn to before me this eighth day of June, 1901.

[Notarial Seal.] H. J. RAMSEY,

Notary Public in and for the State of Washington, Residing at Seattle, Washington.

Copy of within amended answer received and due service of same acknowledged this 8th day of June, 1901.

S. WARBURTON,

Attorney for Plaintiffs.

[Endorsed]: Amended Answer to Amended Complaint. Filed in the United States Circuit Court, District of Washington. September 4, 1901. A. Reeves Ayres, Clerk. A. N. Moore, Deputy.

In the Circuit Court of the United States, District of Washington, Northern Division.

GEORGE E. HILL, ELLEN KELLOGG HILL, EUGENE C. HILL, by Their Guardian EBEN SMITH, and ELIZA MAUDE HILL, in her Own Behalf,
Plaintiffs,
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Defendant.
No. 511.

Replication.

Come now the above-named plaintiffs, and in reply to the allegations contained in the affirmative matter in the answer of the defendant:

I.

In reply to the allegations contained in paragraph one of defendant's first affirmative defense, plaintiffs admit that the defendant is a corporation duly created and chartered by the legislature of the State of New York, and during all of said time has been and is engaged in the business of life insurance. Plaintiffs admit that said defendant has been engaged in transacting life insurance business in the State of Washington, but denies that it has any knowledge or information sufficient to form a belief as to any of the allegations contained in paragraph one not herein admitted.

II.

Deny that they have any knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in the fourth and fifth paragraphs of said first affirmative defense.

III.

As to the allegations contained in paragraph seven of defendant's first affirmative defense, plaintiffs admit that they did not pay defendant any premium on said policy subsequent to the first annual premium, but deny that they neglected or refused to pay any premium or part of any premium subsequent to the first; on the contrary, plaintiffs allege that no request was ever made by said defendant of any one or all of said plaintiffs to pay any premium or part of premium subsequent to the first; that said defendant never notified any one or all of said plaintiffs that any premium or part of a premium on said policy subsequent to the first was due or unpaid. Plaintiffs further allege that if any premum on said policy was unpaid subsequent to the first that no one of them was aware of that fact. Plaintiffs deny that they have any knowledge or information sufficient to form a belief as to any of the allegations contained in said paragraph, except as above admitted.

REPLY TO SECOND AFFIRMATIVE DEFENSE.

I.

In reply to the allegations contained in paragraph one of defendant's second affirmative defense, plaintiffs admit that defendant is a corporation chartered and created by

the legislature of the State of New York as a life insurance company. Denies that it has any knowledge or information sufficient to form a belief as to any of the other allegations in said paragraph one contained.

II.

In reply to the allegations contained in paragraph four of the second affirmative defense, plaintiffs deny that said premium of eight hundred and fourteen dollars was paid on delivery of said policy, but are informed and allege and believe that said premium was paid to the agent of said defendant at the time and concurrent with the delivery of the application for said policy of insurance, and that defendant had the same in its possession when it accepted the application and issued its policy in the city of New York.

III.

In reply to the allegations contained in paragraph six of defendant's affirmative defense, plaintiffs admit that they did not pay to said defendant any premium on said policy subsequent to the first annual premium, but deny that they neglected or refused to pay any premium or part of any premium subsequent to the first; on the contrary, plaintiffs allege that no request was ever made by said defendant of any one or all of the said plaintiffs to pay any premium or part of premium subsequent to the first; that said defendant never notified any one or all of said plantiffs that any premium or part of a premium on said policy subsequent to the first was due or unpaid. Plaintiffs further allege that if any premium on said

policy was unpaid subsequent to the first, that no one of them was aware of that fact. Plaintiffs deny that they have any knowledge or information sufficient to form a belief as to any of the allegations contained in said paragraph except as in this paragraph admitted. Plaintiffs further allege in reply to said paragraph that said policy of insurance never became lapsed or forfeited during the life of said George Dana Hill.

REPLY TO THIRD AFFIRMATIVE DEFENSE.

I.

In reply to the allegations contained in paragraph one of defendant's third affirmative defense, plaintiffs admit that the defendant is a corporation duly created and chartered by the legislature of the State of New York and during all of said time has been and is engaged in the business of life insurance. Plaintiffs admit that said defendant has been engaged in transacting life insurance business in the State of Washington, but denies that it has any knowledge or information sufficient to form a belief as to any of the allegations contained in paragraph one not in this paragraph admitted.

II.

In reply to the allegations contained in paragraph four of defendant's third affirmative defense, plaintiffs admit that defendant, on or about the 15th day of May, 1886, made, executed and delivered to said George Dana Hill its policy of insurance in the sum of twenty thousand dollars for the benefit of his wife in case she survived said George Dana Hill, and if not, then for the benefit of the children

of George Dana Hill and Ellen Kellogg Hill, his wife. Plaintiffs deny that they have any knowledge or information sufficient to form a belief as to any of the allegations in said paragraph not in this paragraph admitted.

III.

As to the allegations contained in paragraph six of defendant's third affirmative defense, plaintiffs admit that they did not pay the said defendant any premium on said policy subsequent to the first annual premium, but deny that they neglected or refused to pay any premium or part of premium subsequent to the first; on the contrary, plaintiffs allege that no request was ever made by said defendant of any one or all of said plaintiffs to pay any premium or part of a premium subsequent to the first; that said defendant never notified any one or all of said plaintiffs that any premium or part of a premium on said policy subsequent to the first was due or unpaid. Plaintiffs further allege that if a premium on said policy was unpaid subsequent to the first, that no one of them was aware of that fact. Plaintiffs deny that said policy of insurance became lapsed, terminated and void and deny that said plaintiffs are estopped from claiming that said policy is an existing contract and deny that they are estopped from claiming any right of recovery on said policy by reason of the death of said George Dana Hill. Plaintiffs deny that they have any knowledge or information sufficient to form a belief as to each and all of the allegations contained in said paragraph not in this paragraph specifically admitted or denied.

REPLY TO FOURTH AFFIRMATIVE DEFENSE.

Plaintiffs deny each and every allegation contained in said fourth affirmative defense.

REPLY TO FIFTH AFFIRMATIVE DEFENSE.

I.

In reply to the allegations contained in paragraph one of defendant's fifth affirmative defense, plaintiffs admit that defendant is a corporation chartered and created by the legislature of the State of New York as a life insurance company. Denies that it has any knowledge or information sufficient to form a belief as to any of the other allegations in said paragraph one contained.

II.

In reply to the allegations contained in paragraph four of said fifth affirmative defense, plaintiffs admit that said policy of insurance was delivered on or about the 15th day of May, 1886, and that a premium of eight hundred and fourteen dollars had been paid on said policy of insurance as a first premium. Plaintiffs are informed and believe and allege that said premium of eight hundred and fourteen dollars was paid at the time and concurrent with the application for said policy of insurance, and was in the possession of the defendant at the time it accepted said application of insurance before it executed its policy of insurance in pursuance to said application.

III.

In reply to the allegations contained in paragraph six of defendant's fifth affirmative defense, plaintiffs admit that they did not pay to said defendant any premium on

said policy subsequent to the first annual premium, but deny that they neglected or refused to pay any premium or part of any premium subsequent to the first; on the contrary, plaintiffs allege that no request was ever made by said defendant of any one or all of said plaintiffs to pay any premium or part of premium subsequent to the first; that said defendant never notified any one or all of said plaintiffs that any premium or part of a premium on said policy subsequent to the first was due and unpaid. Plaintiffs further allege that if any premium on said policy was unpaid subsequent to the first, that no one of them was aware of that fact. Plaintiffs deny that they have any knowledge or information sufficient to form a belief as to any of the allegations contained in said paragraph except as this paragraph admitted.

IN REPLY TO THE SIXTH AFFIRMATIVE DEFENSE.

I.

In reply to the allegations contained in paragraph one of defendant's sixth affirmative defense, plaintiffs admit that the defendant is a corporation chartered and created by the legislature of the State of New York for the purpose of engaging in the life insurance business. Plaintiffs deny that they have any knowledge or information sufficient to form a belief as to any of the allegations contained in said paragraph not in this paragraph admitted.

II.

In reply to the allegations contained in paragraph two of defendant's sixth affirmative defense, plaintiffs admit

that they did not pay to said defendant any premium on said policy subsequent to the first annual premium, but deny that they neglected or refused to pay any premium or part of premium subsequent to the first; on the contrary, plaintiffs allege that no request was ever made by said defendant of any one or all of said plaintiffs to pay any premium or part of premium or part of premium subsequent to the first; that said defendant never notified any one or all of said plaintiffs that any premium or part of a premium on said policy subsequent to the first was due or unpaid. Plaintiffs further allege that if any premium on said policy was unpaid subsequent to the first, that no one of them was aware of that fact. Plaintiffs deny that they have any knowledge or information sufficient to form a belief as to any of the allegations contained in said paragraph except as in this paragraph admitted.

For a further reply to the allegations contained in said paragraph two, plaintiffs allege that said defendant ought to be and is estopped from alleging or claiming that it entered on its said books the policy herein sued upon as forfeited and terminated, contrary to the fact, as well known to said defendant. Said defendant is estopped from claiming as a defense that it misstated to its policy holders that the policy herein sued upon was forfeited when it was not forfeited, of which fact the company was fully aware; that said defendant is estopped from alleging or claiming that it is used up and consumed the whole of the first annual premium of this life policy in extravagant salaries to its officers, in excessive com-

missions to its agents and other useless expenses incurred in securing new business, all contrary to the statute of New York and contrary to its agreement with each of its policy holders; that the actual costs of carrying a policy in the sum of twenty thousand dollars on the life of George Dana Hill for one year at his age of the life at the time of the issuance of said policy of insurance did not exceed two hundred dollars.

AFFIRMATIVE REPLY.

By way of affirmative reply to the matters and allegations contained in the first, second, third, fourth, fifth and sixth affirmative defenses of defendants and to each of them separately, plaintiffs allege as follows:

I.

That the said policy of insurance mentioned in plaintiffs' complaint was applied for by Ellen Kellogg Hill, wife of George Dana Hill, insured, for her own use and benefit, provided she should be living at the time of the death of her husband the said George Dana Hill, and if not, and in the event of her death prior to that of George Dana Hill, then for the use and benefit of the children of the bodies of said George Dana Hill and Ellen Kellogg Hill; that said Ellen Kellogg Hill had property in her own right and her own separate estate sufficient to meet the annual premiums as they became due on said policy; that the said plaintiffs and each of them, subsequent to the death of their mother, the said Ellen Kellogg Hill, had property in their own right, and were ready, willing, and able at all times mentioned in the complaint to pay

any and all premiums that might become due on said policy had they known of the existence thereof; that no legal demand or demand of any character or description was ever made on said Ellen Kellogg Hill during her lifetime for any premium on said policy of insurance subsequent to the first; that no legal demand or demand of any character or description was ever made on any of the plaintiffs herein, upon any of the children of the said Ellen Kellogg Hill, or upon their guardian, Eben Smith, for the payment of any premium subsequent to the first annual premium nor was any notice of any character or description ever given to said Ellen Kellogg Hill or to the said plaintiffs or any of the children of said Ellen Kellogg Hill and George Dana Hill that any premium was due or that any premium on said policy was unpaid; that the said plaintiffs and each of them, the said children of the bodies of said George Dana Hill and Ellen Kellogg Hill, and each of them, were unaware (if such is the case and which is not admitted) that the premiums or any part of the premiums subsequent to the first annual premium were not paid until subsequent to the death of said George Dana Hill, and until they notified the said defendant of the death of said George Dana Hill, and until the said defendant stated and claimed to the plaintiffs subsequent to the death of said George Dana Hill that the policy was forfeited and void and denied all liability on said policy.

II.

That plaintiffs further allege that the said George Dana Hill never was notified of the coming due of any

premium subsequent to the first, and that if said premium was not paid when due, the policy and all payments thereon would become forfeited and void, or that any premium was past due subsequent to the first, and that if said premium was not paid, the policy and all *premiums paid* thereon would be forfeited and void in conformity to and as required by the notice law of New York.

Wherefore plaintiffs demand judgment as set forth in the prayer of the complaint.

S. WARBURTON,
EBEN SMITH,
Attorneys for Plaintiffs.

State of Washington, }
County of Pierce. } ss.

Eben Smith, being first duly sworn on his oath, says that he is one of the plaintiffs herein, that he has read the foregoing reply and knows the contents thereof, and believes the same to be true.

EBEN SMITH.

Subscribed and sworn to before me this 21st day of August, 1901.

[Notarial Seal] E. P. MORAN,
Notary Public, Residing at Seattle, Washington.

We hereby admit due personal service on us of within replication by true and correct copy of the same on this 21st day of August, A. D. 1901.

STRUVE, ALLEN, HUGHES & McMICKEN,
Attorneys for Defendant.

[Endorsed]: Replication. Filed in the United States Circuit Court, District of Washington, August 21, 1901. A. Reeves Ayres, Clerk. H. M. Walthew, Deputy.

In the Circuit Court of the United States for the District of Washington, Northern Division.

GEORGE E. HILL et al.,
Plaintiffs,
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Defendant.
No. 511.

Motion for Leave of Parties to Prosecute in Their Own Right.

Now come the plaintiffs and move the Court that an order be made joining as plaintiffs herein George E. Hill and Ellen Kellogg Hill, in their own right, and that their names be substituted as plaintiffs in their own right in the amended complaint on file herein, instead of their being represented by their guardian, Eben Smith.

This motion is based upon the application and affidavit of said plaintiffs filed herewith.

S. WARBURTON,
HAROLD PRESTON,
Attorneys for Plaintiffs.

[Endorsed]: Motion. Filed this 4th day of September, 1901. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

In the Circuit Court of the United States for the District of Washington, Northern Division.

GEORGE E. HILL et al.,
Plaintiffs,
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Defendant.
No. 511.

Affidavit and Application of George E. Hill and Ellen Kellogg Hill.

United States of America,
State of Washington,
County of King.
ss

George E. Hill and Ellen Kellogg Hill, being first duly sworn, each deposes and says:

At the time the above-entitled action was commenced I was a minor, but have since arrived at the age of majority, and pray that I may be permitted to join in my own behalf as one of the plaintiffs in the prosecution of the above-entitled action.

ELLEN KELLOGG HILL.
GEORGE EDWARD HILL.

Subscribed and sworn to before me this 4th day of September, 1901.

[Notarial Seal] W. A. KEENE,
Notary Public in and for the State of Washington, Residing at the City of Seattle, in said State.

[Endorsed]: Affidavit and Application. Filed this 4th day of September, 1901. A. Reeves Ayes, Clerk. By R. M. Hopkins, Deputy.

In the Circuit Court of the United States for the District of Washington, Northern Division.

GEORGE E. HILL et al.,
Plaintiffs,
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Defendant.
No. 511.

Order Granting Leave to Parties to Prosecute in Their Own Right.

Upon the application of the plaintiffs, it is ordered by the Court, the defendant consenting, that George E. Hill and Ellen Kellogg Hill be permitted to prosecute this action in their own right, in lieu of prosecuting it by their guardian, they having arrived at the age of majority subsequent to the commencement of the action, and that the complaint be deemed amended accordingly.

Done in open court this 4th day of September, A. D. 1901.

C. H. HANFORD,
Judge.

[Endorsed[: Order. Filed this 4th day of September, 1901. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

In the Circuit Court of the United States for the District of Washington, Northern Division.

GEORGE E. HILL et al.,
Plaintiffs,
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Defendant.
No. 511.

Verdict.

We, the jury in the above-entitled action, do find for the plaintiffs, and assess their damages at the sum of twenty-nine thousand and twenty ($29,020.00) dollars.

L. A. DANIELS,
Foreman,

[Endorsed]: Verdict. Filed September 5, 1901. A. Reeves Ayres, Clerk. By A. N. Moore, Deputy.

In the Circuit Court of the United States, for the District of Washington, Northern Division.

GEORGE E. HILL, ELLEN KELLOGG HILL, and ELIZA MAUD HILL, in Their Own Behalf, and EUGENE C. HILL, by His Guardian EBEN SMITH,

Plaintiffs,

vs.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,

No. 511.

Motion for New Trial.

Comes now the above-named defendant, within ten days after the rendition of the verdict in the above-entitled court and cause, and moves the Court to set aside said verdict and for a new trial, upon the following grounds:

1. That the amount of the recovery in said cause is excessive.

2. Error in the assessment of the amount of the recovery, because the verdict is too large.

3. Insufficiency of the evidence to justify the verdict, or any verdict whatever, in favor of plaintiffs or any of them.

4. Error in law occurring at the trial and excepted to at the time by defendant.

5. Because said verdict is contrary to the evidence in the case and contrary to law.

6. Because upon the law and evidence no verdict whatever should have been rendered for plaintiffs, but on the contrary a verdict should have been rendered in favor of the defendant.

This motion is based upon the minutes of the court, and the pleadings and proceedings on file in the clerk's office of said court.

R. C. STRUDWICK and
STRUVE, ALLEN, HUGHES & McMICKEN,
Attorneys for Defendant.

Copy of within motion for new trial received and due service of same acknowledged this 12th day of September, 1901.

S. WARBURTON and
HAROLD PRESTON.
Attorneys for Plaintiffs.

[Endorsed]: Motion for New Trial. Filed in the United States Circuit Court, District of Washington, September 12, 1901. A Reeves Ayres, Clerk. A. N. Moore, Deputy

In the Circuit Court of the United States, District of Washington, Northern Division.

GEORGE E. HILL, ELLEN KELLOGG HILL, ELIZA MAUD HILL and EUGENE C. HILL, By His Guardian, EBEN SMITH,

Plaintiffs,

vs.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,

Defendant.

No. 511.

Order Denying Motion for New Trial.

The matter of a motion for a new trial by the above-named defendant having come on for hearing, the respective parties being represented by their attorneys, the Court being fully advised in the premises, it is

Ordered that said motion for a new trial be, and the same is hereby, denied, to which order of the Court the defendant excepts and its exception is allowed.

C. H. HANFORD,

[Endorsed]: Order. Filed in the United States Circuit Court, District of Washington, November 1, 1901. A. Reeves Ayres, Clerk. A. N. Moore, Deputy.

In the Circuit Court of the United States, District of Washington, Northern Division.

GEORGE HILL et al.,
Plaintiffs,
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Defendant.
No. 511.

Defendant's Motion for Judgment Notwithstanding Verdict.

Now comes the said defendant, The Mutual Life Insurance Company of New York, after the argument and submission of its motion to set aside the verdict in said cause heretofore rendered, and for a new trial thereof, and after the decision of the Court denying said motion, and moves the Court (notwithstanding the said verdict and notwithstanding the action of the Court in refusing to set the same aside and grant a new trial) for judgment in defendant's favor, dismissing plaintiffs' action.

STRUVE, ALLEN, HUGHES & McMICKEN,
EDWARD LYMAN SHORT,
R. C. STRUDWICK,
Attorneys for Defendant.

[Endorsed]: Defendant's Motion for Judgment Notwithstanding Verdict. Filed in the United States Circuit Court, District of Washington, November 1, 1901. A. Reeves Ayres, Clerk. A. N. Moore, Deputy.

In the Circuit Court of the United States, District of Washington, Northern Division.

GEORGE E. HILL, ELLEN KELLOGG HILL, EUGENE C. HILL, by Their Guardian, EBEN SMITH, and ELIZA MAUD HILL, in Her Own Behalf,
Plaintiffs,

vs.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Defendant.

Opinion Filed January 23, 1902.

Action upon a life insurance policy issued to George Dana Hill, father of the plaintiffs; tried before the Court and a jury, resulting in a verdict in favor of the plaintiffs; heard on a motion for judgment in favor of the defendant non obstante veredicto. Motion denied.

STANTON WARBURTON, PRESTON, CARR & GILMAN, EBEN SMITH, for Plaintiffs.

STRUVE, ALLEN, HUGHES & McMICKEN, R. C. STRUDWICK, for Defendant.

HANFORD, District Judge.—Upon the facts alleged and admitted by the pleadings, a judgment in favor of the plaintiffs was rendered by this Court, which was affirmed by the Circuit Court of Appeals; thereupon the case was removed to the Supreme Court of the United States, by a

writ of certiorari, and by that Court the judgment was reversed and the case was certified back to this Court with a mandate for further proceedings in accordance with the opinion delivered by Mr. Justice Brewer. For a complete statement of the case reference is made to the decisions of the Supreme Court reported in 178 U. S. 347-350, and of the Circuit Court of Appeals for the Ninth Circuit, reported in 97 Fed. Rep. 263-270.

The ground upon which the decisions of the two lower courts was reversed is stated in the opinion of the Supreme Court, as follows:

"Here, as in the last two cases, is disclosed a distinct agreement on the part of the insured and the company to waive and abandon the policy and all rights and obligations on the part of the parties thereto.

"But it is said that the insured was not the beneficiary; his wife, and in case of her death, their children, being named as such; and that it was not in his power, by nonpayment or waiver or abandonment, to relinquish or cancel her or their rights in the policy. It is doubtless an interesting question how far the action of the insured can affect or bind the beneficiaries in a life insurance policy. If the answer in this case contained simply the allegation in respect to the insured's agreement with the company, we should be compelled to enter into an examination of that question; but it is alleged, not only that the insured and the company agreed to abandon the contract, but also that the beneficiary, his wife, and the plaintiffs, their children, 'failed, neglected and refused' to pay the premium. So we have a case in which not

only did the insured and the company abandon the contract, but also the beneficiaries neglected and refused to do that which was essential to keep the policy in life. The allegation in the answer does not disclose a mere omission, for it is 'neglected and refused,' and, of course, there can be no refusal unless with knowledge of the opportunity or duty. A party cannot be said to refuse to do a thing of which he knows nothing. Refusal implies demand, knowledge, or notice. The case, therefore, is one in which the beneficiaries refused to continue the policy, while the insured and the company abandoned it."

After being reinstated in this court, the case was brought to a trial and was submitted to a jury for decision of one issue only, which the Supreme Court of the United States held to be a material issue raised by the defendant's answer. The parties were permitted to introduce evidence relating to other facts which were not seriously disputed, for the purpose of developing the case fully and fairly, and to make a record which would enable the attorneys to argue the legal questions to their own satisfaction. The evidence bearing upon the material issue was all in favor of the plaintiffs and the jury rendered a verdict accordingly. The Court afterwards declined to hear arguments on a motion for a new trial, for the reason that a new trial would be a useless proceeding for if the plaintiffs are not entitled to a judgment upon the verdict, they can never prevail, and the law applicable to the conceded facts exonerates the defendant from any liability whatever under the policy sued upon. The defendant then interposed the motion now under considera-

tion, and upon that motion, counsel on both sides have argued the case, earnestly and elaborately, as if the decision of the Supreme Court had completely expunged the previous determinations of this Court and of the Circuit Court of Appeals, and returned the case here to be again considered with respect to the primary question whether the policy lapsed and was rightfully canceled by the defendant for nonpayment of the annual premiums which accrued in the lifetime of George Dana Hill.

In behalf of the plaintiffs it is alleged that by a stipulation in the contract, the parties have explicitly and conclusively determined that the contract was made at the defendant's home office in the State of New York, and as by its terms the contract is to be performed in New York, all questions as to the validity of every one of its provisions and as to the rights and liabilities of the parties under the contract, must be determined in accordance with the laws of the State of New York; that in form, the policy is not for a single term of one year with a right of renewal extending the insurance from year to year, but is a continuing policy subject to forfeiture and cancellation for nonpayment of annual premiums to become due as specified, therefore, the company had no power to cancel this policy, or claim a forfeiture, without complying with the statute of New York, which prescribes that a specified notice must be given in a manner specified, and for failure on the part of the company to give the statutory notice the premiums did not become due and there was no default.

Against this contention the defendant's attorneys have

argued with ingenuity and force, that the contract did not have vitality until the policy was delivered and the first annual premium paid in the State of Washington; that the policy contains an express declaration that the annual premiums are to become due on a specified date in each year, of which notice is given and accepted by the policy itself, and the right to any other notice expressly waived, and that in case of failure to make the payments to accrue as specified, the policy should lapse and the right of the insured under it should be absolutely terminated; that this stipulation is not contrary to any law in force in the State of Washington; that the laws peculiar to the State of New York cannot apply to this contract so as to affect its validity, or limit the rights or obligations of the parties under it, by force of the legislative power of the State of New York; that the statutes of New York may be considered as controlling the contract only so far as the parties by their own agreement have adopted the same, and the particular statute which the plaintiffs have invoked cannot be deemed to have been adopted by the parties contrary to their solemn agreement, although as to matters concerning which the contract is otherwise silent, the laws of the State of New York are made controlling. On the trial it as shown by uncontradicted evidence that a local collecting agent of the defendant company, presented to George Dana Hill, the company's official receipt for the second annual premium when it became due, and requested payment, and also held the receipt for a time and made several demands for payment, and afterwards time for payment was extended by special

direction of the Pacific Coast manager of the company, so as to give ample opportunity to keep the policy alive by payment of the premium, but notwithstanding the efforts to collect the premium, it never was paid, and upon the argument it was insisted that the company dealt only with George Dana Hill; that in all the transactions relating to the policy he represented the beneficiaries; that the company had the right to regard him as being fully authorized to act for the beneficiaries in the matter, and whether the failure to pay the premium was due to his inability to obtain the amount of money required, or any other cause, the mere fact of nonpayment under the circumstances constitutes neglect and refusal on the part of the plaintiffs to pay the premium as alleged by the defendant in the plea referred to in that part of the opinion of the Supreme Court above quoted.

After a great deal of deliberation, I feel constrained to hold that as the main questions above outlined were fully considered by this court and by the Circuit Court of Appeals, and decided in favor of the plaintiffs, and as the decisions of these questions are left undisturbed by the Supreme Court, they must now be regarded as the law of this case. A cluster of cases involving the same or kindred questions were brought before the Supreme Court by this defendant and argued by eminent lawyers in connection with this case, and it is fair to assume that all the different phases of the questions were pressed upon the attention of the court. (See The Mutual Life Ins. Co. Cases, 178 U. S. 327-353; Mutual Life Ins. Co. v. Cohen, 179 U. S. 262.) It appears that both questions did receive atten-

tion and there was a fair opportunity to decide them finally so as to terminate the litigation, if the decision sustained the defendant in either of its contentions, but the Supreme Court refrained from giving any instructions to the Court to which the case was remanded, unless an inference unfavorable to the defendant may be drawn from the fact that this case was distinguished from the Cohen case. If the lower courts erred in holding that this policy could not be canceled for nonpayment of premiums, without compliance on the part of the defendant with the New York statute, the special plea which contained the allegation that these plaintiffs failed, neglected and refused to pay the second premium is complete and sufficient to constitute a valid defense, without that allegation, and the particular matter which the Supreme Court adjudged to be a valid defense is superfluous, or else the preceding allegations as to the place where the contract was actually made, and as to nonpayment by the father of the plaintiffs, tendered only an immaterial issue, for if the statute of New York prescribing that a particular notice must be given and that any agreement contained in the policy waiving that prescribed notice shall be void, is not applicable, and if the stipulations contained in the policy and the laws in force in the State of Washington, are controlling, then the right of the company to cancel the policy became absolute when the time had passed for the payment of the second annual premium, and the refusal of these children to pay that premium after the policy was already dead, is very much like skinning a dead body, but could have no effect on the legal rights of

the parties. The opinion of the Supreme Court, and the references therein made to its decisions in the other cases, shows that it was adjudged by that court that an agreement by competent parties to abandon a policy of insurance would constitute a complete bar to any action upon the policy, and it was shown that the answer contained allegations amounting to a plea of express abandonment by agreement between the defendant and George Dana Hill, but instead of reversing the judgment for error in not giving effect to the plea of abandonment, by George Dana Hill, as it should have done if he was authorized to terminate the right of the plaintiffs, the Court intentionally refrained from expressing any opinion on the question as to the binding effect on the rights of the plaintiffs of his acts and omissions alleged in the answer. The opinion points out that the defendant by its answer raised an issue as to the intentional conduct of the plaintiffs themselves in refusing to pay the premium, distinct from the alleged agreement made by their father to abandon the policy, and it is obvious that the decision of the Supreme Court is hinged upon this issue as to the individual conduct of the plaintiffs themselves. That is made a material issue, and I think that it is the only issue which under the mandate from the Supreme Court was reopened for adjudication in this Court.

The motion must be denied.

C. H. HANFORD,

Judge.

[Endorsed]: Memorandum of Decision on Motion for Judgment non obstante veredicto. Filed January 23, 1902. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

In the Circuit Court of the United States, District of Washington, Northern Division.

GEORGE E. HILL, ELLEN KELLOGG HILL, EUGENE C. HILL by Their Guardian, EBEN SMITH, and ELIZA MAUD HILL, in Her Own Behalf,
Plaintiffs,

vs.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Defendant.

No. 511.

Stipulation Extending Time for Filing Bill of Exceptions.

It is stipulated between the parties hereto that the above-named defendant may have forty days from this date in which to prepare and file its bill of exceptions, and that the time provided by rule for preparing and filing the same be extended accordingly.

Dated at Seattle, Washington, January 28th, 1902.

PRESTON, CARR & GILMAN,
Attorneys for Plaintiffs.

STRUVE, ALLEN, HUGHES & McMICKEN, and R. C. STRUDWICK,
Attorneys for Defendant.

[Endorsed]: Stipulation. Filed in the United States Circuit Court, District of Washington. January 28, 1902. A. Reeves Ayres, Clerk. H. M. Walthew, Deputy.

In the Circuit Court of the United States, District of Washington, Northern Division.

GEORGE E. HILL, ELLEN KELLOGG HILL, EUGENE C. HILL by Their Guardian, EBEN SMITH, and ELIZA MAUD HILL, in Her Own Behalf,
Plaintiffs,
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Defendant.
No. 511.

Order Extending Time to File Bill of Exceptions.

Upon the stipulation of the parties hereto and with the consent of the court, it is ordered that the time for preparing and settling a bill of exceptions on the part of the above-named defendant in this case, be, and the same is hereby, extended forty days from and after the date of this order.

Dated at Seattle, January 28th, 1902.

C. H. HANFORD,
Judge.

[Endorsed]: Order. Filed in the Circuit Court, District of Washington. January 28, 1902. A. Reeves Ayres, Clerk. H. M. Walthew, Deputy.

In the Circuit Court of the United States, District of Washington, Northern Division.

ELIZA MAUD HILL, GEORGE E. HILL, ELLEN KELLOGG HILL, and EUGENE HILL, by His Guardian, EBEN SMITH,

Plaintiffs,

vs.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,

Defendant.

No. 511.

Judgment.

The above cause having heretofore come on for trial in the above court on the 4th day of September, 1901, and the jury having been regularly empaneled, and the Court having heard the proofs and the allegations of the parties and Stanton Warburton, Harold Preston and Eben Smith having appeared for the plaintiffs, and Messrs. Struve, Allen, Hughes & McMicken, and R. C. Strudwick, having appeared for the defendant, and the case having been submitted to the jury upon the instructions of the Court and the allegations of the parties, and the jury having retired to consider the evidence under the instructions of the Court, and having returned a verdict in open court in favor of the plaintiffs and against the defendant on the 6th day of September, 1901, in the

sum of $29,020, and the defendant having filed and served its motion for a new trial and the same having been argued and considered by the court and overruled, and exception to the ruling of the Court duly allowed, and the motion of said defendant for judgment notwithstanding the said verdict having been argued by counsel of the respective parties and having been duly considered was overruled, and exception was duly allowed; now upon the application of the plaintiffs for judgment upon said verdict:

It is ordered, considered, and adjudged that the plaintiffs, Eliza Maud Hill, George E. Hill, Ellen Kellogg Hill and Eugene Hill, do have and recover of and from the defendant, The Mutual Life Insurance Company of New the sum of $29,020.00, together with the sum of $677.13 interest from the 6th day of September, 1901, together with their costs and disbursements in this action taxed at $———, said sum to draw interest from this date at the rate of six per cent per annum. To the rendering of the foregoing judgment said defendant excepts and its exception is allowed.

January 30, 1902.

C. H. HANFORD,
Judge.

[Endorsed]: Judgment. Filed in the United States Circuit Court, District of Washington. January 30, 1902. A. Reeves Ayres, Clerk. H. M. Walthew, Deputy.

In the Circuit Court of the United States, District of Washington, Northern Division.

ELIZA MAUD HILL, GEORGE E. HILL, ELLEN KELLOGG HILL, and EUGENE C. HILL, by His Guardian ad Litem, EBEN SMITH,

Plaintiffs,

vs.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,

Defendant.

No. 511.

Bill of Exceptions.

Be it remembered, this cause came on regularly for trial the 4th day of September, 1901, before the Honorable C. H. Hanford, District Judge presiding; a jury was duly empaneled and sworn, plaintiffs appearing in person and by Messrs. Preston, Carr & Gilman, and S. Warburton, their counsel, and the defendants appearing by Messrs. Struve, Allen, Hughes & McMicken and R. C. Strudwick, Esq., the following proceedings were had and the following exceptions taken, to wit:

Exception No. 1.

Upon the conclusion of the testimony and prior to the argument of counsel to the jury and prior to the charge of the court to the jury, the defendant duly requested the Court to instruct the jury, upon the whole case, and upon

all the evidence in the case, to render a verdict in favor of the defendant, which instruction was refused by the Court; whereupon and while the jury was still at the bar, the defendant duly excepted to the refusal of the Court to give said instruction and its exception was duly allowed by the Court.

The following is all the evidence in the case and the grounds of said request for a verdict for defendant:

PLAINTIFF'S TESTIMONY.

The COURT.—I assume from your opening statement that you are not going to make any offer here to prove that the statutory notice was sent.

Mr. ALLEN.—No, sir.

The COURT.—I wanted to understand if that matter was eliminated from the case.

Mr. ALLEN.—As to the statutory notice, no notice that complies with the terms of the New York statute—we are not going to offer proof as to that.

Mr. WARBURTON.—We offer in evidence an application for the policy of life insurance. This goes in under stipulation.

Mr. ALLEN.—May it please the Court, we have a stipulation here, of which the application is a part. It provides certain things that would be a part of the case of this defendant, and certain things that are general in the case. The last sentence of the stipulation is a general stipulation for both parties. I think that part of the stipulation should go in with it.

Mr. WARBURTON.—I simply offer the application that is admitted to be the original application for the policy.

Mr. ALLEN.—I only ask him to put in so much of the stipulation as to show that this is the applicaton. It is only the last sentence and the others will all be withheld from the jury until I offer them.

The COURT.—You might as well read it all to the jury.

(Application marked Plaintiff's Exhibit "A" and stipulation attached thereto, read to the jury as follows:)

Defendant's Exhibit No. 1.

In the Circuit Court of the United States, District of Washington, Northern Division.

GEORGE E. HILL, ELLEN KELLOGG HILL, EUGENE C. HILL, by Their Guardian, EBEN SMITH, and ELIZA MAUD HILL, in Her Own Behalf,
Plaintiffs,

vs.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Defendant.

No. 511.

Stipulation as to the Testimony of Certain Witnesses on Behalf of Defendant.

To save the expense and inconvenience of issuing commissions, it is stipulated between the parties hereto that the following witnesses, to wit, William J. Easton, Isaac

F. Lloyd and Duer duP. Breck, residing in the city and State of New York, if produced upon the trial and sworn as witnesses on behalf of defendant, will testify as follows, and the said statement shall be admitted in evidence on behalf of defendant with like force and effect as the testimony of the witnesses respectively, as if present at the trial and duly sworn.

The said William J. Easton will testify that he is, and for several years past has been, the secretary of the defendant, Mutual Life Insurance Company, discharging the duties of that office.

That said Duer duP. Breck, now and for several years last past the corresponding secretary of said defendant, and the said Isaac F. Lloyd, now and for several years past one of the vice-presidents of said defendant, each will testify that as appears by the books and records of the defendant at its home office in the city and State of New York, application in writing for insurance upon the life of one George Dana Hill, signed by Ellen Kellogg Hill, by George D. Hill, the person to whom insurance is payable, and by George D. Hill, the person proposed for insurance, dated April 28, 1886, was made and that the original and genuine application, being the same mentioned in the amended complaint and amended answer, is attached to this stipulation and may be offered in evidence as such, by either of the parties to this action, and in pursuance of said application the policy of insurance mentioned in the pleadings was made and executed and transmitted for delivery to the Pacific Coast Agency of defendant; that some time afterwards, as appears by the

said books and records, the first annual premium payable upon the policy was received at the home office of the defendant; that the books and records of said defendant show no other premium payment than eight hundred and fourteen dollars, the amount of the first annual premium on the policy. That the books and the records in the home office at New York show that shortly after April 29th, 1887, the said policy was noted lapsed and forfeited for nonpayment of premium. That at all times from the date of the application until his death, the residence and postoffice address of George Dana Hill were at Seattle, Washington.

S. WARBURTON,
Attorney for Plaintiffs.

STRUVE, ALLEN, HUGHES & McMICKEN,
Attorneys for Defendant.

The following appears on the face:

"Defendant's Exhibit No. 1. Filed in the U. S. Circuit Court, Dist. of Washington, Sep. 4, 1901. A. Reeves Ayres, Clerk. R. M. Hopkins, Dep."

Plaintiffs' Exhibit "A."

Copy of a Five Year Distribution Policy.

(Man's Life) LIFE PLAN, ANNUAL PREMIUMS.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

Age, 40 years. **Amount, $10,000.**

Annual.

Premium.

$322.00.

In consideration of the application for this policy, which is hereby made a part of this contract, The Mutual Life Insurance Company of New York promises to pay, at its home office in the city of New York, unto John Doe, of New York, in the county of New York, State of New York, his executors, administrators or assigns, ten thousand dollars, upon acceptance of satisfactory proofs at its said office, of the death of the said John Doe, during the continuance of this policy, upon the following condition; and subject to the provisions, requirements, and benefits stated on the back of this policy which are hereby referred to and made a part hereof.

The annual premium of three hundred and twenty-two dollars shall be paid in advance on the delivery of this policy and thereafter to the company at its home office in the city of New York, on the first day of September, in every year during the continuance of this contract.

In witness whereof the said, The Mutual Life Insurance Company of New York, has caused this policy to be signed by its president and secretary at its office in the city of

New York, the first day of September, A. D., one thousand eight hundred and eighty-five.

Signed,

RICHARD A. McCURDY, President.

Signed,

ISAAC F. LLOYD, Secretary.

(Here follow provisions identical with those contained in Plaintiff's Exhibit "B," pp. —— to —— hereof.)

Alphabetical APPLICATION. E. J. M.

Register 1-5-8-9

to

Declined 2-8

Ques. and ans. Gener.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK FOR A FIVE YEAR DISTRIBUTION POLICY.

Subject to the Charter of said Company, and the Laws of said State.

The following particulars form a part of the contract with the company:

1. A. Name of person proposed for insurance? (Give each name in full.)

   A. George Dana Hill.

   B. Residence? B. Town, Seattle; County, King; Territory, Wash.

   C. Postoffice address? C. Seattle, Washington Terry.

   Married or single? Married.

2. A. Amount of insurance? A. $20,000 (twenty thousand).

B. Kind of policy? B. Life.

C. Premium, how payable? C. Annual.

D. Age at nearest birthday? D. Forty-six years.

E. Place of birth? E. Sullivan, Ohio.

F. Date of birth? F. February 19th, 1840.

3. A. Name of person to whom insurance is payable at death? A. Ellen Kellogg Hill.

B. Residence? Seattle, W. T.

C. Relationship? C. Wife.

4. A. If a life policy for the benefit of the wife, shall it be paid to her children, to your children, or to the children of the two, if she be not living at its maturity? A. To the children of two.

B. If an endowment, to whom shall it be paid in case you survive the stipulated period? B. ————.

C. If an endowment to whom shall it be paid in case of the death of the beneficiary before the expiration of the period? C. ————.

5. A. Particular occupation or employment? A. U. S. A. officer, retired. —— County Treasurer, King Co., Wash. Ty.

B. Former occupation if recently changed. B. Not changed for several years.

C. Former residence if recently changed? C. Not changed for several years.

D. Have you any intention of changing your residence or occupation? If so, state your intention? D. No.

E. Do you agree not to reside or travel in any part

of the torrid zone, and not to engage in any specially hazardous occupation or employment during the next two years following the date of issue of the policy for which application was made without first obtaining permission from this company? E. I do.

Are you now insured in this company? No. Amt.

Give total amount. No. No Amt.

Give the number of each policy? No. Amt.

6. A. Are you insured in any other company? A. Yes.

B. Name of, and amount of insurance in each company? B. Pacific Mutual of California, $10,000.

* * * * * * * *

(The following declaration and agreement must be signed by the person in whose favor the policy is applied for and by the person whose life is proposed for insurance.)

It is hereby declared and warranted that all the statements and answers as above made are complete and true, and that they, together with this declaration and agreement, constitute an application to The Mutual Life Insurance Company of New York for a policy of insurance, and are offered as a consideration for the policy hereby applied for. And it is agreed that there shall be no contract of insurance until a policy shall have been issued and delivered by said company, and the first premium thereon paid while the person proposed for insurance is in the same condition of health described in this application; and if said policy be issued, the declarations,

agreements, and warranties herein contained shall be a part thereof; and the contract of insurance when made shall be held and construed at all times and places to have been made in the city of New York. It is agreed that in any distribution of surplus, the principles and methods which may be adopted by the company for such distribution, and its determination of the amount equitably belonging to such policy, shall be and are hereby ratified and accepted by and for every person who shall have or claim any interest under said policy. It is also agreed that prompt notice of the death of the insured shall be given to the company, and formal proofs thereof, in accordance with the rules of the company, shall be furnished within one year after the said death.

Dated at Seattle, Tery. of Wash., the twenty-eighth day of April, 1886.

Witness: E. A. TURNER.

Signature of the person to whom the insurance is payable:

ELLEN KELLOGG HILL.
By GEO. D. HILL.

Signature of the person proposed for insurance:

GEO. D. HILL.

(By mutual consent the medical examiner's report immaterial and omitted.)

SPECIAL NOTICE TO APPLICANTS AND POLICY HOLDERS.

1st. The following are the specially hazardous occupations or employments referred to in question 5, E. of the application:

Blasting, mining, submarine labor, aeronautic ascensions, arctic explorations, the manufacture of highly explosive substances, service upon any railroad train, or in switching, or in coupling cars, or on any steam or other vessel, or military or naval service in time of war.

2d. This company cannot entertain any proposition on the part of the husband to change the interest in a wife's policy while said policy is in force in her favor.

3d. The company does not agree to restore a policy after lapse for nonpayment of premiums; and when, in special cases, policies are restored, satisfactory evidence of the insurable condition of the party must be given.

4th. Policy holders must not expect to be notified when their premiums will be due. It is a practice of the company to send these notices, as reminders when the address is known, but no responsibility is asumed on the part of the company in consequence of their nonreception.

5th. In making inquiries, address the general agent through whom the policy was issued or the home office, and state the number of the policy as well as the name of the insured.

6th. The fact that the policy has additions to its credit give no authority to the company to apply them to the payment of premium without written directions from the party insured.

Application of George D. Hill.

No. of policy, 281,470.

Kind of policy, Life, D. P. Due.

Date of policy, 29 day of Ap'l, 1886.

Amt. of policy, $20,000.

Age of party, 46 years.

——— year ——— annual premium, $814.

——— Extra. "

_____

$_____

The above blank spaces are to be filled up only at the New York office.

To

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

Richard A. McCurdy, President,

Nassau, Cedar, and Liberty Streets.

A. B. Forbes, General Agent,

San Francisco, Cal.,

Edition September, 1885.

The following is stamped on the back: "H. F. Heisterman & Co., Real Estate & Insurance Agts., April 30, 1886, Victoria, B. C."

Mr. WARBURTON.—Plaintiffs offer in evidence the policy of insurance.

(Paper referred to by counsel admitted in evidence, marked Plaintiffs' Exhibit "B," and read to the jury as follows:)

Plaintiffs' Exhibit "B."

"No. 281470. A.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

Wife's Life.
Age 46 years.
Annual
Premium.
$814.

Five Year Distribution Policy.
Amount $20,000.

In consideration of the application for this policy, which is hereby made a part of this contract, The Mutual Life Insurance Company of New York promises to pay at its home office in the city of New York, unto Ellen Kellogg Hill, wife of George Dana Hill, of Seattle, in the county of King, Washington Territory, for her sole use, if living, in conformity with the statute, and if not living, to such of the children of their bodies as shall be living at the death of the said wife, or to their guardian for their use, twenty thousand dollars; upon acceptance, if satisfactory proofs at its said office, of the death of the said George Dana Hill during the continuance of this policy, upon the following condition; and subject to the provisions, requirements, and benefits stated on the back of this policy, which are hereby referred to and made part thereof;

The annual premium of eight hundred and fourteen dollars and ——— cents shall be paid in advance on the delivery of this policy, and thereafter to the company at its home office in the city of New York, on the twenty-ninth day of April in every year during the continuance of this contract.

In witness whereof, the said The Mutual Life Insurance Company of New York has caused this policy to be signed by its president and secretary, at its office in the city of New York the twenty-ninth day of April, A. D. one thousand eight hundred and eighty-six.

RICHARD A. McCURDY,
President.

W. J. EASTON,
Secretary.

PROVISIONS, REQUIREMENTS AND BENEFITS.

Payment of Premiums.—Each premium is due and payable at the home office of the company in the city of New York; but will be accepted elsewhere when duly made in exchange for the company's receipt, signed by the president or secretary. Notice that each and every such payment is due at the date named in the policy, is given and accepted by the delivery and acceptance of this policy, and any further notice, required by any statute is thereby expressly waived. That part of the year's premium, if any, which is not due and is unpaid at the maturity of this contract shall be deducted from the amount of the claim. If this policy shall become void by nonpayment of premium, all payments previously made shall be forfeited to the company except as hereinafter provided.

Dividends.—This policy is issued on the five year distribution plan. It will be credited with its distributive share of surplus apportioned at the expiration of each five years from the date of issue. Only policies in force at the end of such terms, and entitled thereto by year of issue, shall share in such distribution of the surplus; and

no other distribution to such policies shall be made at any other time.

All surplus so apportioned may be applied at the end of such periods to purchase additional insurance, or in payment of future premiums on this policy, if requested in writing, or may then be drawn in cash.

Paid-up Policy.—After three full annual premiums have been paid upon this policy, the company will, upon the legal surrender thereof before default in payment of any premium, or within six months thereafter, issue a paid-up policy, payable as herein provided for the amount required by the provisions of the act of May 21, 1879, chap. 347, Laws of the State of New York.

Surrender.—This policy may be surrendered to the company at the end of the fifth year from the date of issue, and eighty per cent of the reserve computed by the American table of mortality and four and one-half per cent interest, and the surplus as defined above will be paid therefor. If surrendered at the end of the second or of any subsequent five year period the full reserve by the same standard and the surplus as defined will be paid. No cash value will be paid for a surrender at any other time or date.

NOTICE.

Powers of Agents.—No agent has power on behalf of the company to make or modify this or any contract of insurance, to extend the time for paying a premium, to bind the company by making any promise, or by receiving any representation or information not contained in the application for this policy.

Assignments.—The company declines to notice any assignment of this policy until the original or a duplicate or certified copy thereof shall be filed in the company's home office. The company will not assume any responsibility for the validity of an assignment.

The following appears on the back:

FIVE YEAR DISTRIBUTION POLICY.

No. 281470. A.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

Insurance on the Life of George D. Hill.

Amount $20,000. Date April 29th, 1886.

Term of life ————.

Annual payment, $814. With Guarantee of Paid-up Policy.

Stamped on back: "H. F. Heisterman & Co. Real Estate, May 22, 1886. Insurance Agents, Victoria, B. C."

Mr. WARBURTON.—I offer in evidence papers that I have had marked for identification Plaintiffs' Exhibits "C" and "D" for identification.

Mr. ALLEN.—The genuineness of the papers I concede, but we object to their introduction as irrelevant, immaterial and incompetent.

The COURT.—Objection overruled and exception noted for the defendant.

(Papers marked Plaintiffs' Exhibits "C" and "D" and read to the jury as follows:)

Plaintiff's Exhibit "C."

EBEN SMITH, THOMAS T. LITTELL.
United States Master in Chancery.

LAW OFFICES OF SMITH & LITTELL,
Rooms 309 and 310 Butler Block,
Seattle, Washington, December 23d, '90.

To the Secretary of the Mutual Life Insurance Co., New York City, N. Y.

Dear Sir:—We are executors of the last will and testament of the late George Dana Hill, who lost his life on December 4th, by accident.

In looking among his papers, we find a policy of insurance No. 281,478, in your company, insuring the life of said Hill for the benefit of his wife, Ellen Kellogg Hill, for the sum of twenty thousand (20,000) dollars.

Will you please forward to us the necessary blanks in order that we may perfect and send forward to you at once proofs of Captain Hill's death, as required by the rules and regulations of your company. An early compliance with this request will be esteemed a personal favor.

Very truly yours,
EBEN SMITH,
DAVID KELLOGG,
Ex'rs.

(Testimony of Eben Smith.)

Plaintiff's Exhibit "D."

DEPARTMENT OF CORRESPONDENCE.
THE MUTUAL LIFE COMPANY OF NEW YORK.
Richard A. McCurdy, President.

New York, Feb. 3d, 1891.

Mr. Eben Smith, Seattle, Wash.

Dear Sir:—Your favor of the 23d of Dec., 1890, received. We beg to state that policy No. 281,478—G. D. Hill was forfeited for nonpayment of premium on April 30th, 1887.

Yours truly,

H. E. DUNCAN, JR.,
Corresponding Secretary.

Mr. PRESTON.—It is agreed between counsel that the policy referred to in these letters is the policy in suit.

EBEN SMITH, a witness called on behalf of the plaintiffs, being first duly sworn, testifies as follows:

Q. (Mr. PRESTON.) You are the Eben Smith who is plaintiff in this cause as guardian of certain minor children of Geo. D. Hill, deceased? A. Yes, sir.

Q. When were you appointed guardian of these children?

A. Well, it was sometime after the death of Ellen K. Hill, the mother of these children. I could not give you the exact date, but she died in 1887, in February.

Q. Was there ever any other guardian appointed to these chidren before you?

A. No, sir, I was the only guardian that acted for these children, that is, appointed by the court.

(Testimony of Eben Smith.)

Q. You have since been their guardian?

A. Yes, sir.

Q. And are now? A. Yes, sir.

Q. Calling your attention to the policy of insurance, exhibit "B," which has been put in evidence in this case, I will ask you when you first heard of the existence of that policy?

A. After the death of George D. Hill, which occurred December 4th, 1890.

Q. Prior to that time had you any knowledge that there was a policy of insurance on his life in this company?

Mr. ALLEN.—I object as irrelevant and immaterial.

THE COURT.—Objection overruled, exception noted for the defendant. A. None whatever.

Q. During your guardianship of these children and prior to the death of Captain George D. Hill, was there any request ever made upon you by or on behalf of the defendant company to pay any premium on that policy?

Mr. ALLEN.—I object as irrelevant and immaterial.

A. No, sir, not a particle of instruction.

The COURT.—Objection overruled exception noted for defendant.

Q. Did you at any time prior to the death of George D. Hill have any knowledge of the nonpayment of any premium.

Mr. ALLEN.—I object as irrelevant and immaterial.

(Testimony of Eben Smith.)

The COURT.—Objection overruled, exception noted for the defendant.

A. No, sir, I did not. I would like to make one correction. I stated I was the only guardian appointed by the Court. That is corrrect, but after the death of George D. Hill I found that I was named testamentary guardian under his will.

Cross-Examination.

Q. (Mr. ALLEN.) You speak of being the only guardian of these children. Their father was alive and they were living with him, were they not, at the time of their mother's death in 1887? A. Yes, sir.

Q. They were inmates of the home of their father, were they not—he was the head of the family?

A. At that time, yes.

Q. And at the time that you were appointed guardian? A. Yes, sir; with this possible qualification. I think the eldest child was at Tacoma at the Seminary. I may not be entirely correct.

Q. But still, under his parental care?

A. Yes, sir, still under his parental care.

Q. Now, do you know how old these children were at that time? A. Well, I cannot give that.

Q. These children also continued under their father's parental care at the time of his death.

A. I so understood it.

Q. They were all residing here, that is, the home of Captain Hill was here in Seattle during all of that time?

A. Yes, sir.

(Testimony of witness closed.)

(Testimony of Mrs. Eliza Maud Bowman.)

Mrs. ELIZA MAUD BOWMAN, a witness called on behalf of the plaintiffs, being duly sworn, testified as follows:

Q. (Mr. PRESTON.) Are you one of the plaintiffs in this case? A. I am.

Q. George E. Hill and Ellen Kellogg Hill and Eugene C. Hill are your brothers and sisters are they not?

A. Yes, sir.

Q. Can you tell the Court the ages of each of these children?

Mr. ALLEN.—I object as irrelevant and immaterial. this is affirmatively set up in the answer.

Mr. WARBURTON.—I do not think the answer sets up the correct ages of these children.

The COURT.—Objection overruled, exception noted for the defendant.

Q. You may state, if you can, the age of George E. Hill?

A. Do you mean at the present time—24 years.

Q. When was he born? A. In 1877.

Q. What month? A. April.

Q. When was Ellen Kellogg Hill born, if you know?

A. 1883, August 26th.

Q. Eugene Carey?

A. In April—no he was born in 1883 and she was born in 1881—in August, 1881, is her age and April, 1883, is Carey's age.

(Testimony of Mrs. Eliza Maud Bowman.)

Q. When were you born? A. In 1873.

Q. What month? A. May.

Q. Mrs. Bowman, when did you first become aware of the existence of this policy?

Mr. ALLEN.—I object as irrelevant and immaterial.

The COURT.—Objection overruled, exception noted for the defendant.

A. Two or three years after my father's death.

Q. Was there ever any demand or notice given you on behalf of the company of nonpayment of any premiums?

Mr. ALLEN.—I object as irrelevant and immaterial.

The COURT.—Objection overruled, exception noted for defendant.

A. No, not that I remember of.

(Testimony of witness closed.)

GEORGE E. HILL, a witness being called on behalf of the plaintiffs being first duly sworn, testifies as follows:

Q. (Mr. WARBURTON.) Are you one of the plaintiffs in this case? A. I am.

Q. When did you first learn of the existence of the policy of insurance?

Mr. ALLEN.—I object as irrelevant and immaterial.

The COURT.—Objection overruled, exception noted for defendant.

A. After father's death.

(Testimony of George E. Hill.)

Q. Were you ever aware of the nonpayment of premiums, if that is a fact, prior to his death, on this policy?

Mr. ALLEN.—I object as irrelevant and immaterial.

THE COURT.—Objection overruled, exception noted for defendant.

A. No, sir.

Q. Was there ever any demand or notice given you on behalf of the company, or anyone else, of nonpayment of any premium on this policy prior to your father's death?

Mr. ALLEN.—I object as irrelevant and immaterial.

THE COURT.—Objection overruled; exception noted for defendant. A. No, sir.

(Testimony of witness closed.)

ELLEN KELLOGG HILL, a witness called on behalf of the plaintiffs, being duly sworn, testifies as follows:

Q. (Mr. WARBURTON.) State your name.

A. Ellen Kellogg Hill.

Q. Are you one of the plaintiffs in this case?

A. I am.

Q. Miss Hill, when did you first become aware of the existence of the policy of insurance sued upon here.

Mr. ALLEN.—I object as irrelevant and immaterial.

The COURT.—Objection overruled, exception noted for the defendant.

A. Well, I am not sure what time, but it was not until

(Testimony of Ellen Kellogg Hill.)

it was put into the hands—until it was made a suit.

Q. You were not aware until after the suit?

A. No, not until after the suit was begun.

Q. Were you ever aware of the nonpayment of any premium prior to your father's death, if such be the case?

Mr. ALLEN.—I object as irrelevant and immaterial.

The COURT.—Objection overruled, exception noted for the defendant.

A. No, sir, I never knew anything about the policy.

Q. No demand or notice was ever given to you of the nonpayment of the premium by the company or anyone else? A. No.

Mr. ALLEN.—We object as irrelevant and immaterial.

The COURT.—Objection overruled, exception noted for defendant.

(Testimony of witness closed.)

EUGENE CAREY HILL, a witness called on behalf of the plaintiffs, being duly sworn, testifies as follows:

Q. (Mr. WARBURTON.) What is your name?

A. Eugene Carey Hill.

Q. Are you one of the plaintiffs in this case?

A. I am, through my guardian.

Q. When did you become aware of the existence of this policy?

Mr. ALLEN.—I object as irrelevant and immaterial.

The COURT.—Objection overruled, exception noted for the defendant.

(Testimony of Eugene Carey Hill.)

A. I did not until after my father's death hear about it.

Q. Was there any notice or demand of any character or description for the payment of premium ever made upon you during your father's life?

Mr. ALLEN.—I object as irrelevant and immaterial.

The COURT.—Objection overruled, exception noted for the defendant.

A. None whatever.

Q. State whether you are aware, if such be the fact, of nonpayment of any premium prior to your father's death.

Mr. ALLEN.—I object as irrelevant and immaterial.

The COURT.—Objection overruled, exception noted for the defendant.

A. No, sir.

(Testimony of witness closed.)

Mr. WARBURTON.—We rest.

Mr. ALLEN.—May it please the Court at this we move the Court for a nonsuit as the case is made. (Argument by counsel.)

At this time a recess was taken until two o'clock P. M.

Afternoon Session.

Continuation of proceedings pursuant to adjournment.

The COURT.—I consider this to be a very close question and I am not disposed to grant this motion; and yet

I am not prepared to say just exactly what the ruling of the Court should be. I do not wish to be understood as committed at all in overruling this motion now. I will require the defendant to go on with its defense and this question will be further considered, if you choose to make a motion after all the evidence is in on an instruction or to consider it further after a verdict. The motion is denied.

Mr. ALLEN.—We will ask an exception.

The COURT.—Exception allowed.

DEFENDANT'S TESTIMONY.

Mr. ALLEN.—I will read the stipulation which was read in part by learned counsel on the other side.

Mr. PRESTON.—Mr. Allen is about to offer in evidence agreed facts as to the method pursued in the initiation of this contest.

Mr. ALLEN.—I propose to read the stipulation.

Mr. PRESTON.—I want to raise a question as to the materiality of the proof. It is his purpose, I presume, to read in evidence the agreed facts in regard to how it was this contract was initiated, and what procedure the parties, the agents and the applicant Hill, went through to secure the issuance of this policy, with a view of sustaining the defense interposed here, that the contract was made in this state. We wish to object to it on the ground that it is incompetent, irrelevant, and immaterial in view of the fact that the parties by the contract

have agreed that the contract of insurance was made in the state of New York. I desire to be heard for a few moments on this proposition. (Argument by counsel.)

The COURT.—The evidence, I think, is proper to show the surroundings and circumstances under which the contract was made. I will overrule the objection and allow an exception for the plaintiff.

(Stipulation offered by counsel marked as Defendant's Exhibit No. 1.)

Mr. ALLEN.—I next offer in evidence, may it please the Court, the certified articles or statutory charter with amendments of The Mutual Life Insurance Company, the defendant, and with it a certified copy of the appointment of statutory agents in the State of Washington. I will state that denial was made on knowledge and information as to whether the laws had been complied with in this respect.

(Charter of the company marked Defendant's Exhibit No. 2.)

(Appointment of the agents marked Defendant's Exhibit No. 3. The following is a copy of exhibits Nos. 2 and 3, and read to the jury:)

(It is stipulated that defendant filed copy of its charter and amendments to the same, duly certified and authenticated in the office of the Secretary of State of the State of Washington, in compliance with the laws relating to foreign corporations transacting business in said State, the same being exhibit No. 2 herein, and the following appointment of statutory agent, duly certified and authenticated, being exhibit No. 3 herein.)

Defendant's Exhibit No. 3.

Know All Men by These Presents:

That The Mutual Life Insurance Company of New York, a corporation duly organized and existing under and by virtue of the laws of the State of New York, and having its home office and principal place of business in the city of New York, in said State, but doing business in the State of Washington, does, pursuant to the provisions of section 14, chapter 82 of the Session Laws of the State of Washington for the year 1895, hereby make, constitute and appoint R. C. Strudwick, a citizen of the State of Washington and a resident of Seattle, in said state, its true and lawful attorney, and does hereby authorize R. C. Strudwick to make and accept service in any proceedings in any court in said State of Washington, or of the United States therein.

In witness whereof, the said The Mutual Life Insurance Company of New York has caused its corporate seal to be hereto affixed, and these presents to be signed, executed, acknowledged, and delivered in its name and behalf by Robert A. Granniss, its vice-president, this 12th day of December, A. D. 1895.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

[Corporate Seal] By ROBERT A. GRANNISS,
Its Vice-President.

(Filed Dec. 26.)

The foregoing instrument was duly certified and authenticated. By mutual consent the certificates thereof are omitted.

Mr. ALLEN.—We desire, as the Court may not take notice of a special act of the legislature, to introduce in evidence the act incorporating The Mutual Life Insurance Company of New York, with its amendment. We have now produced in evidence a certified copy from the records of the Secretary of State of the State of Washington. If there is any question by counsel as to this being proper evidence for all purposes, I have a certified copy made by the Secretary of the State of New York under the seal of the State, a copy of the charter and the amendments, being chapter 246 and An Act to Incorporate the Mutual Life Insurance Company of New York, passed April 12th, 1840.

(Papers received without objection and marked Defendant's Exhibit No. 4, and read to the jury as follows:)

(It being agreed that all of said instruments are duly certified and authenticated, but that the certificates showing the same be omitted from this bill of exceptions.)

Defendant's Exhibit No. 4.

Chapter 246.

An Act to Incorporate the Mutual Life Insurance Company of New York.

Passed April 12, 1842, by a two-thirds vote.

The People of the State of New York, represented in Senate and Assembly to enact as follows:

Section 1. William H. Aspinwall, James Brown, John W. Leavitt, Elihu Townsend, James S. Wadsworth, Philip S. Van Rensselaer, Gouverneur M. Wilkins, John V. L. Pruyn, Thomas W. Olcott, Charles L. Livingstone,

Joseph Blunt, Jacob P. Giraud, John C. Cruger, Alfred Pell, David C. Golden, Jacob Harvey, Robert B. Minturn, Mortimer Livingston, Rufus L. Lord, Arthur Bronson, Henry Brevoort, Theodore Sedgwick, Stacy B. Collins, Robert C. Cornell, James Boorman, James Campbell, William Moore, Morris Robinson, Zebedee Cook, Junior, Jonathan Miller, Fitz Green Hallock, John A. King, T. Romeyn Beck, Richard V. DeWitt, Gideon Hawley and James J. Ring, and all other persons who may hereafter associate with them in the manner hereinafter prescribed, shall be a body politic and corporate by the name of The Mutual Life Insurance Company of New York.

Section 2. In addition to the general powers and privileges of a corporation, as the same are declared by the third title of the eighteenth chapter of the first part of the Revised Statutes, the corporation hereby created shall have the power to insure their respective lives, and to make all and every insurance appertaining to or connected with the life risks and to grant and purchase annuities.

The real estate which it shall be lawful for the said corporation to purchase, hold and convey, shall be:

1st. Such as shall be requisite for its immediate accommodation in the convenient transaction of its business; or,

2d. Such as shall have been mortgaged to it in good faith by way of security for loans previously contracted, or for money due; or

3d. Such as shall have been conveyed to it in satisfaction of debts, previously contracted in the course of its dealings; or

4th. Such as shall have been purchased at sales upon judgments, decrees or mortgages obtained or made for such debts.

The said corporation shall not purchase, hold or convey real estate in any other case or for any other purpose, and all such real estate as shall not be necessary for the accommodation of said company in the convenient transaction of its business, shall be sold and disposed of within six years after the said company shall have acquired title to the same, and it shall not be lawful for the said company to hold such real estate for a longer period than that above mentioned.

Section 3. All persons who shall hereafter insure with the said corporation, and also their heirs, executors, administrators and assigns, continuing to the insured in the said corporation as hereinafter provided, shall thereby become members thereof during the period they shall remain insured by said corporation and no longer.

Section 4. All the corporate powers of the said company shall be exercised by a board of trustees and such officers and agents as they may appoint. The board of trustees shall consist of thirty-six persons, all of whom must be citizens of this State. They shall elect a president annually, who shall be a member of this corporation and they shall have power to declare by by-law, what number of trustees less than a majority of the whole, but not less than nine, shall be a quorum for the transaction of business.

Section 5. The persons named in the first section of this act shall constitute the first board of trustees.

Section 6. The trustees shall, at their first meeting, divide themselves by lot, into four classes of nine each. The term of the first-class shall expire at the end of one year; the term of the second class shall expire at the end of two years, the term of the third class shall expire at the end of three years, the term of the fourth class shall expire at the end of four years, and so on successively each and every year. The seats of these classes shall be supplied by the members of this corporation, a plurality of votes constituting a choice but an insurance of at least one thousand dollars in amount shall be necessary to entitle any member to a vote. The section shall not be construed to prevent a trustee going out from being eligible to a re-election. The board of trustees may fill any vacancies in their number, occasioned by death, resignation, or removal from the State. The election of trustees shall be held on the first Monday of June in each year at such place in the city of New York as the board of trustees shall designate, of which they shall give at least fourteen days previous notice, in two of the public newspapers printed in the said city, and the board of trustees shall at the same time appoint three members of the said corporation inspectors to preside at such election; and if any of the said inspectors decline or fail to attend, the trustees may appoint others to fill such vacancies.

Section 7. Every person who shall become a member of this corporation, by effecting insurance therein, shall the first time he effects insurance, and before he receives his policy, pay the rates that shall be fixed upon and determined by the trustees, and no premium so paid shall

even be withdrawn from said company, except as hereinafter provided, but shall be liable to all the losses and expenses incurred by this company during the continuance of its charter.

Section 8. The trustees may determine the rates of insurance and the sum to be insured.

Section 9. It shall be lawful for the said corporation to invest the said premiums in the securities designated in the following sections, and to sell, transfer, and change the same, and reinvest the funds of said corporation when the trustees shall deem expedient.

Section 10. The whole of the premiums received for insurance by said corporation, except as provided for in the following sections, shall be invested in bonds and mortgages on unincumbered real estate within the State of New York, the real property to secure such investment of capital shall in every case be worth twice the amount loaned thereon.

Section 11. The trustees shall have power to invest a certain portion of the premiums received, not to exceed one-half thereof, in public stocks of the United States, or of this State, or of any incorporated city in this state.

Section 12. Suits at law may be maintained by said corporation against any of its members, for any cause relating to the business of said corporation; also suits at law may be prosecuted and maintained by any member against said corporation for losses by death, if payment is withheld more than three months after the company is duly notified of such losses; and no member of the corporation shall be debarred his testimony as witness in any

such cause, on account of his being a member of said company, and no member of the corporation not being in his individual capacity a party to such suit, shall be incompetent as a witness in any such cause on account of his being a member of said company.

Section 13. The officers of said company, at the expiration of five years from the time that the first policy shall have been issued, and bear date, and within thirty days thereafter, and during the first thirty days of every subsequent period of five years, shall cause a balance to be struck of the affairs of the company in which they shall charge each member with a proportionate share of the losses and expenses of said company according to the original amount of the premium paid by him, but in no case to exceed the amount of the premium. Each member shall be credited with the amount of said premium, and also with an equal share of the profits of said company derived from investments and earnings in proportion to said amount; and in case of the death of any member of the said company, the amount standing to his credit at the last preceding striking of balance as aforesaid, together with the proportion which shall be found to belong to him at the next subsequent striking of said balance, shall be paid over to his legal representatives or assigns within three months after the said last-mentioned balance shall be struck. Any member of the company who would be entitled to share in the profits, who shall have omitted to pay any premium, or any periodical payment due from him to the company, may be prohibited by the trustees from sharing in the profits of

the company, and all such previous payments made by him shall go to the benefit of the company.

Section 14. On some day in the first thirty days after the expiration of the first five years from the time when the said company shall issue their first policy, and within the first thirty days of every subsequent five years, the officers of the said company shall cause to be made a general balance statement of the affairs of the said company which shall be entered in a book prepared for that purpose, which shall be subject to the examination of any member of the company during the usual hours of business for the term of thirty days thereafter. Such statement shall contain:

1st. The amount of premiums received during the said period.

2d. The amount of expenses of the said company during the said period.

3d. The amount of losses incurred during the same period.

4th. The balance remaining with the said company.

5th. The nature of the security on which the same is invested or loaned, and the amount of cash on hand. The said company shall also make and transmit to the Comptroller of the State on the first day of January in each year, a full statement of its affairs in the same manner as moneyed corporations are required to do under the second title of the eighteenth chapter of the first part of the Revised Statutes. The books of the said company shall be open to the examination of any member thereof during the usual hours of business, in the same manner

as the books of the moneyed corporations are required by the Revised Statutes to be kept open for the inspection of the stockholders thereof.

Section 15. The sections of the Revised Statutes from nineteen to twenty-five, both inclusive, of the first article of the second title of the eighteenth chapter of the first part shall not be applicable to the corporation hereby created.

Section 16. The operations and business of the corporation shall be carried on at such place in the city of New York as the trustees shall direct.

Section 17. No policy shall be issued by said company until application shall be made for insurance in the aggregate of five hundred thousand dollars at least, and the trustees shall have the right to purchase for the benefit of the company all policies of insurance or other obligations issued by the company.

Section 18. The legislature may at any time alter or repeal this act.

Section 19. This act shall take effect immediately.

Chapter 60.

An Act to Amend the Act Entitled "An Act to Incorporate the Mutual Life Insurance Company of New York," Passed April 12, 1842.

Passed March 25, 1851.

The People of the State of New York Represented in Senate and Assembly do Enact as Follows:

Section 1. Section thirteen of the act entitled "An act to incorporate the Mutual Life Insurance Company of New York," passed April 12, 1842, is hereby amended, and shall hereafter read as follows, viz:

Section 13. The officers of said company at the expiration of five years from the time that the first policy shall have been issued and bear date, and within sixty days thereafter, and during the first sixty days of every subsequent period of five years, shall cause a balance to be struck of the affairs of the company, and shall credit each member with an equitable share of the profits of the said company. And in case of the death of the party whose life is insured, the amount standing to his credit at the last preceding striking of balance, as aforesaid, shall be paid over to the person entitled to receive the same, and the proportion which shall be found to belong to him at the next striking of balance, shall be paid when the same shall be ascertained and declared. Any member of the company who would be entitled to share in the profits who shall have omitted to pay any premium or any periodical payment due from him to the company, may be prohibited by the trustees from sharing in the profits of the company, and all such previous payments made by him shall go to the benefit of the company. No member except officers and agents thereof shall be personally liable for the losses of the company, and such officers and agents, severally, shall only be liable for the losses arising by reason of their own respective neglect or misconduct.

Chapter 131.

An Act in Relation to the Dividend of the Mutual Life Insurance Company of New York.

Passed April 2, 1862; three-fifths being present.

The People of the State of New York Represented in Senate and Assembly, do Enact as Follows:

Section 1. The Mutual Life Insurance Company of New York may appropriate its dividends either to the purchase of additional insurance payable with the policy, or at the option of the insured, in reduction of, or toward the annual payment of premiums on policy, such dividends may be declared every five years or oftener at the option of the said company, provided, that said company shall not make such appropriation in reduction of any annual premium without the consent first had and obtained of the superintendent of the insurance department, after each dividend, as to all persons entitled to such dividend.

Section 2. This act shall take effect immediat ·ly.

JAMES FORMAN, a witness called on behalf of the defendant, being first duly sworn, testifies as follows:

Q. (Mr. ALLEN.) Where do you reside?

A. Victoria.

Q. How long have you resided there?

A. Going on eleven years.

Q. State, if you please, what, if any, relation you hold to the defendant, The Mutual Life Insurance Company?

A. I am a partner in the firm of Heisterman & Company at Victoria.

Q. When did you go into the firm of Heisterman & Company? A. In 1896.

Q. How long have you been employed there?

A. Since April, 1891.

Q. In that office?

A. Yes, sir, previous to going into the firm.

(Testimony of James Forman.)

Q. And in what capacity were you employed?

A. Bookkeeper and accountant and confidential clerk. I had knowledge of everything that went on inside of the office of Heisterman & Company.

Q. Did you know H. F. Heisterman? A. I did.

Q. Who was the other partner?

A. George W. Haines.

Q. Is Mr. Heisterman living?

A. No, he died in August, 1896.

Q. Is Mr. Haines living?

A. Mr. Haines died in December, 1898, I believe, in 1897, or 1898—I would not be positive.

Q. You had, as confidential clerk and bookkeeper an opportunity of knowing of all the business of the firm?

A. Yes, sir.

Q. For eleven years?

A. Yes, sir, it is the date that I went into the office.

Q. Do you know the handwriting of Mr. Heisterman?

A. I do.

Q. You say they have been, during all this time you have spoken of, the agents of The Mutual Life Insurance at Victoria?

A. The firm has represented the company since 1873.

Q. Since 1873? A. Yes, sir, twenty-eight years.

Mr. ALLEN.—I will state, may it please your Honor, in introducing or offering to introduce certain letters, the originals are filed in the books of the various offices from which they come, all of which I have had compared copies made from the originals, and if the originals are ad-

(Testimony of James Forman.)

mitted I would like to withdraw them and substitute the compared copies so that we will not deplete the records of the offices from which they came, if that is agreeable to Court and counsel.

Mr. PRESTON.—There is no objection to that.

Q. I will place in your hands, Mr. Forman, a paper bearing date April 30th, 1886, with the signature H. F. Heisterman & Company, and ask you, if you please, to examine it. Do you recognize that paper?

A. I do.

Q. Do you recognize the signature to it?

A. Yes, sir; I have a copy of that letter in our letter-book. It is signed by Mr. Heisterman of Heisterman & Company.

Q. And it is his signature? A. Yes, sir.

Q. You know that?

A. I know that, I can positively swear to his signature.

Mr. ALLEN.—We offer this letter in evidence.

Mr. PRESTON.—I desire to make the same objection to this as I interposed to the last offer of evidence, and then the further ground that this is not the best evidence of the transaction set forth. This letter is from Heisterman & Company to Mr. Forbes in San Francisco, saying: "Herewith find application of George Dana Hill of Seattle for policy in suit."

Mr. ALLEN.—I have to have some order of proof. I shall follow this up by showing that Mr. Forbes is the

(Testimony of James Forman.)

general Pacific Coast agent, and that all the general conduct of the business is from his place on the coast. That it was all sent to his office and there was forwarded to the head office.

The COURT.—Objection overruled, exception noted for the plaintiff.

(Paper admitted in evidence and marked Defendant's Exhibit No. 5 and read to the jury as follows:)

Defendant's Exhibit No. 5.

Copy.

H. F. Heisterman & Co.,
Real Estate Agents,
Sehl's Block,
Government Street.

A. B. Forbes, Rec'd
May 4, 1886,
General Agent, S. F.

Victoria, B. C., April 30, 1886.

A. B. Forbes, Esq., San Francisco, Cal.

Dear Sir: Enclosed please find monthly collection and draft for $528.90 to balance the same. Miss McCandlish has gone to Europe and is not expected to return before June. Her brother has gone for her, and as we cannot collect we return the premium receipt. Mr. Black's D. receipt has not been returned to us yet we expect it tomorrow.

Herewith please find application from George Dana Hill of Seattle for $20,000. Life a pr. $814.

Yours very truly,
H. F. HEISTERMAN & CO.

(Testimony of James Forman.)

The endorsement on the back is as follows: "Defendant's Exhibit 5. Filed in the U. S. Court, Dist. of Washington. Sep. 4, 1901. A. Reeves Ayres, Clerk. R. M. Hopkins, Dep."

I next hand the witness a letter of date May 29, 1886, signed H. F. Heisterman & Company, and ask the witness to state if he recognizes that letter.

A. This was written by Mr. Heisterman.

Q. The same as the former letter? A. Yes, sir.

Mr. ALLEN.—I now offer this letter in evidence.

Mr PRESTON.—We object to that, if your Honor please, on the ground that it is incompetent, irrelevant, and immaterial. I meant to call your Honor's attention also to the fact that the only thing that this would be offered to prove would be the nonpayment of the $814, the first premium, until some time after. We think it is not good evidence of the fact to introduce a letter written by one agent of the defendant company to another stating the fact, it is hearsay.

The COURT.—What is the purpose of that letter, Mr. Allen?

Mr. ALLEN.—It shows, may it please your Honor, the reception of the money out here along with the other letters after the receipt of the policy out here.

The COURT.—Objection overruled, exception noted for the plaintiff.

(Paper marked Defendant's Exhibit No. 6 and read to the jury as follows:)

(Testimony of James Forman.)

Defendant's Exhibit No. 6.

Copy.

(P. O. Drawer 4.)

H. F. Heisterman & Co.,

Real Estate Agents,

Sehl's Block.

Government Street.

Victoria, B. C., May 29, 1886.

A. B. Forbes, Esq., San Francisco, Cal.

Dear Sir: Your several favors 20th inst. duly received In regard to new policy 281,470, Hill Prem. $814—we expect the money over on Monday or Tuesday as we learn that the insured was not prepared to pay till 1st June.

We send you herewith Draft on San Francisco for $724.45 to balance May collections in full.

Shaw's renewal receipt was mailed overland to you on 27 inst. and ought to reach prior to this letter. We were put to considerable trouble in vain to find the party who last time paid in New Westminster. At same time we sent proper voucher for Edgar Marvin policy 170,475. Marvin says he won't be able to fix that policy till Mr. Jackson's return from England.

Thanks for pamphlets Liberality & security & best Company which will come in usefully.

We expect to have a No. 5,000 appl. for this mail if the Doctor makes examination in time—otherwise first steamer overland.

(Testimony of James Forman.)

How will it be abt our deferred 10 per cent on Turner's new policies? The premiums due us thereon amt to $47.97. We allowed him 30 per cent in order to get him to push business. Shall we charge our Com.? Or how do you advise settlement?

Yours very truly,

H. F. HEISTERMAN & CO.

The following endorsement appears on the back: "Defendant's Exhibit 6. Filed in the U. S. Circuit Court, Dist. of Washington, Sep. 4, 1901. A. Reeves Ayres, Clerk. R. M. Hopkins, Dep."

Q. I now offer you for examination a letter of June 15th, 1886, signed by H. F. Heisterman & Company and ask you if you recognize that.

A. I do; it is signed by Mr. Heisterman.

Q. That is Mr. Heisterman's handwriting, is it?

A. Yes, sir.

Mr. ALLEN.—I now offer this letter in evidence.

Mr. PRESTON.—We object for the reason stated in our last objection.

The COURT.—Objection overruled, exception noted for the plaintiffs.

(Paper marked Defendant's Exhibit No. 7 and read to the jury as follows:)

(Testimony of witness closed.)

(Testimony of James Forman.)

Defendant's Exhibit No. 7.

Copy.

H. F. Heisterman & Co.,

Real Estate Agents,

Government Street.

A. B. Forbes,

Jun. 21, 1886.

General Agent, S. F.

Victoria, B. C., June 15th, 1886.

A. B. Forbes, Esq., San Francisco, Cal.

Dear Sir: Your valued favor 8th inst. duly received and contents have our careful attention. Do you desire our 3 Rate Books, 1885—returned? The rates are the same with some additional information as to reture premium rates & Estimated Results. The 20 Rates books you advise have not yet come to hand.

Enclosed we have much pleasure to hand herewith application of Walter Herbert Finlaison for $2000, 15 y Endowm paid in 10 years prem. ½ a $93.20. Dividends every 5 years with liberty to draw the same then.

Enclosed please find draft on Wells for $447.—being Capt. Hill's premium paid E. A. Turner on 12 inst. Turner writes "had I pressed payment and delivery of policy I might have had one of those ghastly cases of "not taken" to report now the captain has got it. He has got $814. invested and he'll keep it."

(Testimony of James Forman.)

Mr. Turner neglected to send Dr. Minor's voucher for $5.—have written him to send it direct on to you if not forwarded here meantime.

Policy 281,470 Geo. D. Hill paid 12 June 86, $814.

Dr. Minor	$ 5.	
Exch. from Seattle	2.80	
40 per cent com. thereon	325.60	
Exch. on S. F. on bt. ¾	3.60	
Draft to balance	477.	$814

We would like to have a couple more Agents rate books one for Mr. Haynes and one for Mr. Quilline. The latter will visit S. F. likely the next steamer and then call upon you.

Yours truly,

H. F. HEISTERMAN & CO.

The following endorsement appears on the back: "Filed in the U. S. Circuit Court, Dist. of Washington. Sep. 4, 1901. A. Reeves Ayres, Clerk. R. M. Hopkins, Dep."

HOWARD H. LEWIS, a witness called on behalf of the defendant, being duly sworn, testifies as follows:

Q. (Mr. ALLEN.) Mr. Lewis where were you living in the spring of 1887? A. Seattle.

Q. In what business were you engaged at that time?

A. In the real estate and insurance business.

Q. What insurance company were you acting for?

A. For The Mutual Life Insurance Company of New York, among others.

(Testimony of Howard H. Lewis.)

Q. That is the defendant in this case.

A. I take it to be, yes.

Q. Were you in that capacity associated with anyone, and if so, whom.

A. I was associated with Mr. E. A. Turner, he was my partner.

Q. At what times were you associated with Mr. Turner as the agent of the defendant, that is, at Seattle?

A. Our partnership commenced sometime in the fall of 1886 and continued through the winter of 1888 and 1889, somewheres in the neighborhood of two years.

Q. Mr. Turner had been the agent before that?

A. Yes, sir.

Q. Do you know whether Mr. Turner is living or dead, Mr. Lewis? A. He is dead.

Q. I will ask you if, while you were the agent, you had anything to do with the life insurance policy and the premiums of life insurance policy of Captain George D. Hill? A. Yes, sir, we did.

Q. I place in your hands Mr. Lewis, a letter bearing date May 31, 1887, signed Turner & Lewis. Examine it, if you please. In whose handwriting, if you know, is that letter and signature?

A. The entire letter is in my handwriting.

Q. Signature and all?

A. Signature and all, yes.

Q. I will ask you if you know Captain George D. Hill? A. I did.

Q. How long had you known him at this time?

(Testimony of Howard H. Lewis.)

A. Well, I supose I knew him from the time of my first coming to Seattle, which was in 1875.

Q. You resided here then?

A. I think that Captain Hill was here at the time I came. I am quite sure he was.

Q. Do you know what official position he held?

A. Yes, he was treasurer of King county for several terms.

Q. Do you know about his being connected with the Regular Army of the United States?

A. Well, of my own personal knowledge, I do not, except from general reports.

Q. Do you know that was the general report?

A. That was the general report.

Q. You have been about the courtroom and heard the question of his eligibility to hold a civil office tested because of his being an officer of the regular army?

Mr. PRESTON.—I object to that as immaterial.

The COURT.—Objection sustained.

Mr. ALLEN.—We now offer this letter in evidence, may it please your Honor, as the letter is identified by the witness.

Mr. PRESTON.—We renew our last objection made to the admission of the other letters.

Mr. WARBURTON.—I think we might add to that at this time the further ground that any statement or declaration of Mr. Hill is not binding on the parties to this action.

(Testimony of Howard H. Lewis.)

The COURT.—I will overrule the objection. Exception noted for the plaintiff.

(Paper received and marked Defendant's Exhibit No. 8 and read to the jury as follows:)

Defendant's Exhibit No. 8.

Copy.

THE MUTUAL LIFE INSURANCE CO. OF NEW YORK.

Richard McCurdy, President.

A. B. Forbes, General Agent for Pacific Coast Office General Agency, No. 214 Sansome Street, San Francisco, Cal.

Seattle, W. T., May 31st, 1887.

A. B. Forbes, Esq., Gen'l Agt., San Francisco, Cal.

Dear Sir: We regret having to return you herewith prm. receipts of Hill, Berb & Budlong, as uncollected, We especially regret this in Capt. Hill's case as the policy is a large one, and his intention is to pay the premium, but he is short of money. He expects to have the money in a few days and if you can hold the receipt for a few days we will notify you by wire as soon as premium is paid and you can forward us receipt.

Very truly,

TURNER & LEWIS.

Rec'd A. B. Forbes. June 3, 1887, General Agent, S. F.

The following endorsement appears on the back:

(Testimony of Howard H. Lewis.)

"Defendant's Exhibit 8. Filed in the U. S. Circuit Court. Dist. of Washington, Sept. 4, 1901. A. Reeves Ayres, Clerk. R. M. Hopkins, Dep."

Q. I also hand you a paper, Mr. Lewis, of date July 8th, 1887, signed Turner & Lewis, and ask you to examine that. Now, you may state, if you know, in whose handwriting that is.

A. That is also in my handwritng; the body of the letter and the signature.

Mr. ALLEN.—I now offer this letter in evidence, may it please the Court.

Mr. PRESTON.—We desire to preserve the same record on the admission of this paper as before and including the grounds stated by Mr. Warburton.

THE COURT.—Objection overruled, exception noted for the plaintiffs.

(Paper marked Defendant's Exhibit No. 9 and read to the jury as follows.)

Defendant's Exhibit No. 9.

Copy.

THE MUTUAL LIFE INSURANCE CO. OF NEW YORK.

Richard A. McCurdy, President.

A. B. Forbes, General Agent for Pacific Coast, Office General Agency, No. 214 Sansome Street, San Francisco, Cal.

(Testimony of Howard H. Lewis.)

Turner & Lewis,
Real Estate, Loan,
and
General Insurance
Agents,
Seattle, Wash. Ter.

Seattle, W. T., July 8th, 1887.

Mr. A. B. Forbes, Gen'l Agent, San Francisco, Cal.

Dear Sir: We enclose herewith statement for June, with check for two hundred and fifty dollars ($250) to balance. We have included in this check 89c. due on last statement.

Also find herewith receipts No. 272,427, No. 274,069, No. 281,470, which we cannot deliver.

We hold over for collection of June receipts No. 270,-887, No. 292,593, No. 288,504, No. 271,554.

Very truly yours,

TURNER & LEWIS.

Since writing the above, we find draft of David Kellogg for $28.86, No. 98,560. Please credit us with this amount on next statement.

TURNER & LEWIS,

Rec'd A. B. Forbes Jul. 11, 1887, General Agent, S. F.

The following endorsement appears on back: "Defendant's Exhibit 9. Filed in U. S. Cir. Court, Dist. of Washington. Sep. 4, 1901, A. Reeves Ayres, Clerk. R. M Hopkins, Dep."

(Testimony of Howard H. Lewis.)

Q. Mr. Lewis, state if you know, how you happened to write the second letter of July 8th, 1887, after having written the first one?

A. The letter which you just read, the last one?

Q. Yes.

A. Well, the occasion of writing that letter was the return of the receipt.

Q. Just tell the jury what that receipt was.

Q. You mean the nature of the instrument?

Q. Yes.

A. That was the receipt signed by some general official of The Mutual Life Insurance Company. I have forgotten which official at this time, it is so long ago, but it was the receipt for the premium which was due upon the policy at that time.

Q. And upon the payment of the premium you are authorized to deliver the receipt to the holder of the policy?

A. We were to deliver the receipt to the policy holder for the payment of the money, and not otherwise.

Q. And if the money was not paid you would return the receipt to Mr. Forbes, would you not?

A. Yes, sir.

Q. You had returned it as you say in this letter of May 31? A. Yes, sir.

Q. And why was it you returned it again after it came to you and why was it you returned it again in July?

A. For the reason that we were unable to deliver the receipt.

(Testimony of Howard H. Lewis.)

Q. Why were you unable to deliver the receipt?

A. Because we were unable to collect the money that was due upon the receipt.

Q. And being unable to collect the premium you would return it? A. I returned the receipt.

Q. The premium receipt to Mr. Forbes, the general agent at San Francisco? A. Yes, sir.

Q. Did you see Captain Hill about this time yourself?

A. Yes, sir, I went and called upon Captain Hill at that time.

Q. Then you had occasion to talk to him about the premium being paid?

Mr. WARBURTON.—We object to any statement or declaration that Captain Hill made, for the reason that it would not be binding upon his beneficiaries.

The COURT.—Objection overruled, exception noted for the plaintiffs.

Q. And it was after talking to him in regard to the payment of the premium that you wrote these letters sending the premium receipt back? A. Yes, sir.

Q. State if he knew that you had the premium receipt here to deliver to him on payment?

A. Yes, silr, we always took these with us.

Q. Mr. Lewis, you may state, if you please, when you went out of partnership with Mr. Turner, about when?

A. Somewhere very close to March 1889.

Q. Did he or you keep the letters and correspondence?

A. I kept all the correspondence.

(Testimony of Howard H. Lewis.)

Q. I believe you went away yourself in 1895, did you not? A. I left here in 1895.

Q. To make your home in California?

A. Yes, sir.

Q. You may state what you did with the letters and correspondence you received and had from The Mutual Life Insurance Company attending to the business before?

A. Mr. Turner withdrew from the firm, leaving all the correspondence with me. I kept all the correspondence of the firm up to the time that I left Seattle. At that time I destroyed all the old letters of the firm.

Mr. ALLEN.—I ask these questions for the reason that I may want to introduce a letter-press copy of some letters.

Q. (The COURT.) Can you fix the time when you had the talk with Captain Hill about the premium?

A. I can only fix it from the date of these letters. This would be the only way that I would be able to fix it.

Q. Sometime between the two?

A. Sometime between the first and last letters.

(Testimony of witness closed.)

A. B. FORBES, a witness called on behalf of the defendant, being first duly sworn, testifies as follows:

Q. (Mr. ALLEN.) What, if any, position do you hold in the Mutual Life Insurance Company, the defendant in this case?

(Testimony of A. B. Forbes.)

A. I am their general agent for California at present, Nevada and the Hawaiian Islands.

Q. How is it as to this Northern country?

A. I am not representing them here. They are represented her by Mr. Gillespy or this party at Victoria.

Q. Up to what time was the state of Washington and British Columbia included in your work?

A. Up to 1895.

Q. How long have you been the general agent for the coast? A. Going on 33 years.

Q. And have you, during that time, had the management and general control of its business here.

A. Up to 1895, yes.

Q. Now, you may state, if you please, Mr. Forbes, say prior to 1886 and the years following, what was the custom and rule of the company taking insurance when an application was made for insurance, through a local agent. Was there any rule and custom as to what should be done with that and to whom it should be transmitted?

A. All local agents in my general agency were obliged to report officially and report all these applications to me.

Q. Then an application made in the State of Washington or British Columbia placed in the hands of your agent would be transmitted to you at San Francisco?

A. Yes, sir.

Mr. PRESTON.—We desire to preserve the same objection as to all of this.

(Testimony of A. B. Forbes.)

The COURT.—Objection overruled, exception noted for the plaintiffs.

Q. And you forwarded it to the home office at New York City?

Mr. PRESTON.—I renew my last objection.

The COURT.—Objection overruled, exception noted for the plaintiffs.

A. I forwarded them to New York City.

Q. You may state, if you know, whether there was any rule of practice obtaining during these years if the application was accepted as to what the company did with the policy, if it made one out?

Mr. PRESTON.—We renew our last objection to this.

The COURT.—Objection overruled, exception noted for the plaintiffs.

A. They made out the policy and sent it back to me from New York. I would send on sometimes fifty applications in the mail and they would send the policies back to me.

Q. And when they came to you, what was the practice?

A. I would mail them to different agencies—the agent from whence they had been received and would have them delivered on the payment of the premium.

Q. Now, coming to that question, what was the rule as to the policies when issued, being sent by you and received by you from the home office and sent by you to

(Testimony of A. B. Forbes.)

the local offices to different towns and places, for instance Seattle and Victoria after the receiving of the premium.

Mr. PRESTON.—We renew our last objection.

The COURT.—Objection overruled, exception noted for the plaintiffs.

A. When they received the policies they were ordered to deliver on payment of premium and then they would remit that premium to me when they received it and send a statement.

Q. So that the premium was paid when the policy was delivered at the residence of the insurer?

Mr. PRESTON.—We renew our last objection.

The COURT.—Objection overruled, exception noted for the plaintiffs.

A. Exactly so. They might call in the office of the agents sometimes but generally they take the policy to the business office of the insured.

Q. And what was the course after the policies were issued and delivered in the manner that you speak of in the first instance in regard to the collection of the premiums?

A. It was collected by the agent and remitted to me by the agent.

Q. From what sources, if any, did what was known as the renewal receipt or premium receipt come?

A. They came from the insured, the renewal receipt.

(Testimony of A. B. Forbes.)

About the second year we will say, or the third year, or whatever year it would happen to be if it was a policy, a receipt would be sent and forwarded to the agency where the insured resided and that would be collected and remitted.

Q. You forwarded the renewal receipt or the receipt for the premium?

A. I forwarded it to the agent, yes.

Q. And what was his authority in regard to it?

A. His authority was our instructions or my instructions as general agent and a receipt signed by the secretary of the company.

Q. What was his authority to deliver that except upon payment of premium?

A. That is all, that was the only authority that there was. All the authority was to see that the premium was paid.

Q. Give this renewal or premium receipt.

A. To the man who owned the policy, the insured.

Q. If the premium was not paid when due according to the date of the policy, what was the duty of the agent in regard to that receipt?

A. He had to return it to us because it represented so much cash in our charges or accounts.

Q. That was charged up against him?

A. Yes, sir.

Q. And whether he would return it back to you and you would return it back to him?

(Testimony of A. B. Forbes.)

A. I would return it to New York after a certain time. Sometimes agents would say if you will hold this a little while we think we can deliver it, and in such case we would hold it.

Q. Suppose, Mr. Forbes, the insured delayed in paying the premium?

A. Well, the receipt was returned to us immediately by the agent. We generally held the receipt a while in San Francisco, because some persons would get certificates of health and pay their assessments to the agent, and we would accept the money, so that the company would have the certificate to show that it was in accordance with our instructions.

Q. If a man failed to pay on a particular day a certificate of health became necessary? A. Yes, sir.

Q. That was procured from the surgeon?

A. From the examining physician. We had forms and we used to send them to the agent.

Q. In that case, with that certificate being furnished, the receipt might be delivered?

A. It would be delivered and the agent would forward the money and the receipt would be given to them. We would then advise the company and remit the money to them in that way.

Q. Mr. Forbes, do you remember anything about a policy being issued to George D. Hill?

A. Yes, sir, I do.

Q. That is the same policy that the witnesses have been testifying about?

(Testimony of A. B. Forbes.)

A. Yes, sir. We received the application first from Heisterman & Company, early in May, the 4th of May, I think.

Q. I show you this paper and ask you if you recognize that?

A. Yes, sir, I recognize this. This is the policy that was sent to us by the company. I think we have the letter here.

Mr. ALLEN.—We offer this in evidence.

Mr. WARBURTON.—We object for the reason heretofore stated.

The COURT.—Objection overruled, exception noted for the plaintiffs.

(Paper admitted in evidence and marked Defendant's Exhibit No. 10 and read to the jury as follows:)

Defendant's Exhibit No. 10.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

New York, May 13, 1886.

A. B. Forbes, Esq.

Dear Sir: The following policies are sent by this day's mail.

Truly yours,

W. E. EASTON,

Secretary.

Name.	No.
J. D. Byrnes	281,449
Walter Behn	466
Geo. D. Hill	470

(Testimony of A. B. Forbes.)

Stamped on face: "A. B. Forbes, May 20, 1886, General Agent, S. F."

The following endorsement appears on the back: "Defendant's Exhibit 10. Filed in the U. S. Circuit Court, Dist. of Washington. Sep. 4, 1901. A. Reeves Ayres, Clerk. R. M. Hopkins, Dep."

Q. I will ask you, Mr. Forbes, to explain about the headings under the word "name" and under the word "number."

A. This is a form of business; for instance, they were all under the main number 281,000. The first number was 449, and so on.

Q. This should read then 281,449, J. D. Byrnes, Walter Behn, 281,446, George D. Hall, 281,470?

A. Yes, sir.

Q. What does this indicate this stamp mark on the bottom?

A. That indicates the day that I received this policy from New York, on the 20th of May, 1886.

Mr. ALLEN.—I have not a copy of this, but will ask permission to substitute a copy for the original, which I have just offered in evidence.

Q. I place this letter in your hands, dated May 5th, 1886, signed A. B. Forbes & Company and ask you if you recognize that.

A. I do. It is in the handwriting of one of my clerks, my head clerk, the corresponding clerk.

Q. Was that letter written by your authority and under your direction? A. It was.

(Testimony of A. B. Forbes.)

Mr. ALLEN.—We offer this letter in evidence.

Mr. WARBURTON.—We object for the reason heretofore stated.

The COURT.—Objection overruled, exception noted for the plaintiffs.

(Paper received, marked Defendant's Exhibit No. 11, and read to the jury as follows:)

Defendant's Exhibit No. 11.

Copy.

May 15th, 1886, per Mexico 5-7.

Messrs. H. F. Heisterman & Co., Victoria, B. C.

Dear Sirs: Your favors 27th and 30th ult. duly received, covering April a|c, application of Geo. D. Hill and dft. for $528.90, as advised. Yours truly,

A. B. FORBES,

W. G. A.

The following endorsement appears on the back: Filed in the U. S. Cir. Court, Dist. of Washington, Sep. 4, 1901. A. Reeves Ayres, Clerk. R. M. Hopkins, Dep."

Q. I now place in your hands, Mr. Forbes, another letter, and ask you if you recognize that.

A. That is the same handwriting and by the same clerk; it is his business to attend to all that part of it.

Q. Was the draft for $528.90 in connection with the Hill matter?

A. No, I think not. (Referring to exhibit No. 11.)

Mr. ALLEN.—We offer in evidence the letter just identified by the witness.

(Testimony of A. B. Forbes.)

Mr. WARBURTON.—We renew our objections.

The COURT.—Objection overruled, exception noted for the plaintiffs.

(Paper marked Defendant's Exhibit No. 12, and read to the jury as follows:)

Defendant's Exhibit No. 12.

Copy.

May 20th, 1886, Per Mexico, 5-21.

Messrs. H. F. Heisterman & Co., Victoria, B. C.

Dear Sirs: I enclose for collection Policy 281,470 Hill, Annual Prem. $814.00. Please collect and remit.

Yours truly,

A. B. FORBES,

W. G. A.

The following endorsement appears on the back: "Filed in the U. S. Cir. Court, Dist. of Washington. Sep. 4, 1901. A. Reeves Ayres, Clerk. R. M. Hopkins, Dep."

Q. Mr. Forbes, have you some other letters?

A. Yes, sir.

Mr. ALLEN.—I was going to offer the letter-press copy-book, but the letter books are at the office. We have copies of them here, and counsel say they may be taken the same as the letter-press copies.

Q. Please examine these copies.

A. These are the letters.

Mr. ALLEN.—We offer these letters in evidence.

Mr. WARBURTON.—We renew our objection to these letters.

(Testimony of A. B. Forbes.)

The COURT.—Objection overruled, exception noted for the plaintiffs.

(Letter dated June 3d, 1887, marked Defendant's Exhibit No. 13, and letter dated June 6th, 1887, marked Defendant's Exhibit No. 14 and read to the jury as follows:)

Defendant's Exhibit No. 13.

Copy.

June 3d, 1887.

Messrs. Turner & Lewis, Agts., Seattle, W. T.

Dear Sirs: I have your favor of the 31st covering uncollected April renewals, viz:

281,470 Hill.
291,644 Berb.
273,908 Budlong.

If you wire me collection of Capt. Hill's renewal, No. 281,470—April 29th, $814, so as to reach me on or before 13th, I will advance the prem. in my May a|c and await your remittance.

After 13th a ctf. of the Health will be requisite. I enclose three blanks. Should you need them, the enclosed will prove handy.

Very truly yours,

pp. A. B. FORBES, G. A.

JON E. AGER.

The following endorsement appears on the back: "Filed in the U. S. Cir. Court, Dist. of Washington. Sep. 4, 1901. A. Reeves Ayres, Clerk. R. M. Hopkins, Dep."

(Testimony of A. B. Forbes.)

Defendant's Exhibit No. 14.

Copy.

June 6th, 1887.

Messrs. Turner & Lewis, Seattle, W. T.

Gentlemen: Your telegram notifying of payment of Mr. Berb's prem. rec'd. I enclose his receipt, No. 291,644. Amt. $56.37. I also enclose renewal No. 281,470 Hill, $814, which I trust you will also be able to collect before the time mentioned in my advices, or failing in that, that Mr. H., when able, will reinstate the policy, furnishing a certificate of his good health.

We are anxious that Mr. Hill should not lose the benefit of premium already paid in.

Please hold this receipt till further instructions.

Yours truly,

A. B. FORBES,

Gen'l Agt.

F.

The following endorsement appears on back: "Defendant's Exhibit 14. Filed in the U. S. Cir. Court, Dist. of Washington. Sep. 4, 1901. A. Reeves Ayres, Clerk. R. M. Hopkins, Dep."

Q. I will ask you, Mr. Forbes, where these original letters—you may state whether the letters, exhibits 8 and 9, were received in your office.

A. This one was received June 3d, 1887, and the second one was received July 11th, 1887.

Q. And they are a part of your files?

(Testimony of A. B. Forbes.)

A. They are a part of my files in my office at this time. This is one to the insurance department, and the other one came to—

Q. But the originals of these were received at your office as noted by the marks upon them, and are now a part of the files of the office.

A. Yes, sir. I was going to say that our letters of June 3d and 6th to Mr. Turner and to Turner & Lewis, were in reply to their first letter, and the second one written by my son, who was then cashier, was written under my dictation. I dictated the latter part of that letter. I also ordered him to return that renewal receipt at once to Messrs. Turner & Lewis, that they possibly might deliver it, and it would be better for them to have it at hand, subject to instructions by the first letter.

Mr. PRESTON.—I move to strike out the statement of the witness as to his reasons for dictating the letter.

The COURT.—Motion denied, exception noted for the plaintiffs.

Q. So the receipt had been sent up once and returned to you? A. Returned to me.

Q. And then, as stated in your letter, for the purpose of giving an opportunity of payment, you sent that back?

A. I sent it back because of the large premium, and we felt anxious to keep this policy before us.

Q. And the letter of July 8th to Turner & Lewis was the one that brought the receipt back to you?

A. They returned it promptly, yes.

(Testimony of A. B. Forbes.)

Q. You may state, Mr. Forbes, if you have, aside from the correspondence, a recollection in regard to the Hill insurance? A. I have a distinct recollection.

Q. What was it, if you please, that gave you this distinct recollection?

A. There was several points. One was that it was a large policy and a large premium.

Q. That would have been a large policy at that date in this country?

A. Yes, sir, in this part of the country, and we were very anxious to maintain this policy on our books, and for that reason I recollect distinctly that I dictated to my son and ordered him to return the receipt, and dictated what he should say to Turner & Lewis in regard to Captain Hill's premium, and that he might have the advantage, and credit him with what he paid in before.

Q. Now, you may state whether or not you know whether any other than the first annual premium was ever paid on this policy.

A. None came to me, to my agency, and I do not know of any other payment otherwise. I cannot say—I do not know of any. If the premium had been paid elsewhere I would have been advised, because it was of record in my agency, and they could have advised me of any premium paid in any agency, and they would have sent me a notice.

Q. You never had notice or information of anything more than the first annual payment?

A. That is all, sir.

(Testimony of A. B. Forbes.)

Q. There would have been no authority on the part of any agent to have paid it without the renewal receipt?

A. No, the company held me for all these receipts.

Q. Was there any renewal receipt after the return of this receipt to you by the letter of July 18th, 1887, ever sent up here from your office? A. For Hill?

Q. Yes. A. Never.

Q. These other letters, Mr. Forbes—I think I have called your attention to the Turner & Lewis letters, you have some other letters that I handed back to you, the originals of them. Now, you may state, if you please, if the originals of exhibits 5, 6 and 7, letters of Heisterman & Company, directed to you, were received at your office?

A. Yes, sir, they were received. The first one was May 4th, 1886; April 30th, 1886, that was received May 4th. The one of May 29th, 1886, was received June 1st, 1886, in our office, and the one of June 5th, was received June 21, 1886.

Q. And they are filed in your office under your own charge?

A. Yes, sir. I have a very complete file, and I keep all papers very carefully. If I send them to New York they send back the originals, and I am obliged to send back their originals to them.

Cross-Examination.

Q. (Mr. WARBURTON.) Mr. Forbes, I notice in your letter of June 3d (exhibit 13) you say "After the 13th a

(Testimony of A. B. Forbes.)

certificate of health will be requisite." And just before that you say, "If Mr. Hill's premium reaches you by the 13th you will advance the premium in the main account."

A. If he had received it by that time, you will see something about—

Q. I ask you if from that you made your report to the company for the main collections that you received on the 13th of June?

A. Yes, sir, on the 13th, and they were forwarded on the 15th of June.

Q. After you returned the receipt to the company in New York, the party would have to furnish a certificate of health before he could pay his premium?

A. No; the point was, that if he was later than that, he should furnish a certificate and then we would hold the receipt.

Q. I understand that, but after the 13th of June he would have to furnish a certificate of health?

A. Yes, sir.

Q. And if anybody had offered to pay it they would have had to furnish a certificate of health before the company would accept it? A. Yes, sir.

Q. How many days of grace would he have to furnish a certificate of health?

A. No days of grace were given.

Q. How could you give him until the 13th?

A. We gave that because it was a new policy and we had authority to do that.

Q. For a few days?

(Testimony of A. B. Forbes.)

A. For a few days on a new policy, yes, sir.

Q. That would be extending from the eleventh to the thirteenth? A. Yes, sir.

Q. After that he would be required to send a health certificate? A. Yes, sir.

Redirect Examination.

Q. (Mr. ALLEN.) No certificate of health was ever furnished in this case?

A. No. We sent blanks up.

Q. (Mr. WARBURTON.) You sent them to your agent?

A. Yes, sir, we sent them to our agent.

(Testimony of witness closed.)

JAMES FORMAN, recalled on behalf of the defendant, testifies as follows:

Q. (Mr. ALLEN.) I want to ask you, Mr. Forman, if the originals of the letters, exhibits 11 and 12, were received in the office at Victoria by Heisterman & Company?

Mr. PRESTON.—I object, because the witness has testified that he was not in the office until 1891.

Q. I will ask you to state, if you know, what the stamped mark, H. F. Heisterman & Company, Real Estate, May, 1886, Insurance Agents, Victoria, B. C., and the one, H. F. Heisterman & Company, Real Estate, May 22, 1886, Insurance Agents, Victoria, B. C., indicate from the practice and course of business of that office?

(Testimony of James Forman.)

Mr. PRESTON.—We object because the witness cannot be familiar with the practice of the office before he was in it.

The COURT.—Objection overruled, exception noted for the plaintiffs.

A. I can only say that these letters came to me in that form from the office files. As far as I know they have been there from the date received. That is the date they were received in each case. I recognize that stamp as a date stamp in the office. It was still in use when I went into the office, and that is the date these letters were received.

Q. That was the practice and custom and system to stamp the date received? A. They did it, yes.

Q. These papers are filed in the office of Heisterman & Company?

A. Yes, sir, taken from their files, we keep our files in a fire proof vault. I took these out myself.

(Testimony of witness closed.)

At this time further proceedings were adjourned until to-morrow morning at ten o'clock.

Seattle, September 5th, 1901, 10 o'clock A. M.

Continuation of proceedings pursuant to adjournment.

Mr. ALLEN.—May it please the Court, I wish to offer in evidence the application and petition of George D. Hill to have Mr. Eben Smith appointed guardian of his children. This application was made in March, 1888, and a showing made upon it and the fixing of the bond

in the case at five thousand dollars. I desire to offer this for the purpose of showing that Mr. Hill was at this time here in the city of Seattle, and that at this time he was the person representing these plaintiffs. He set up that he was the father and the natural guardian and that following what we have already shown in regard to the notice brought home to Captain Hill, and that he makes no mention whatever of this insurance, and that the amount of the bond, five thousand dollars, excluded the idea of its being a property asset. For these and the other reasons appearing upon the face of it I desire to offer it in evidence.

Mr. PRESTON.—This proceeding, as I understand from Senator Allen, was offered first to prove that at the time the petition was filed, George D. Hill was a citizen of this city. That has already been proved by their evidence, and is admitted in the pleadings. Second, it is to show that at time, perhaps two years after Mrs. Hill's death, it is a sort of a declaration of George D. Hill to the effect that this policy was not in force because he did not refer to it or mention it in his general statement of what property the estate consists of. He says it consists largely of real property. We object to it on the ground that it is incompetent, irrelevant and immaterial as against these plaintiffs. The point of the objection that I desire to call directly to your Honor's attention is, that his statement would not be binding upon these plaintiffs, even if it were his statement.

Mr. ALLEN.—I offer this for the purpose named and for the purpose of showing that these children were here in Seattle; that their father was acting as the natural guardian up to that time, that he knew and is the person who is charged by virtue of this policy of insurance and is given charge of the whole matter of paying the premiums and receiving the notice of everything in relation to that, and that he had notice given to him, as we claim, for the preceding year. That as the time approached for another annual premium to become due, he occupied this position to these children, and that he sought to have a guardian appointed and that he made no suggestion whatever of there being a policy that he was keeping up and that had not been abandoned. And presenting the matter to the Court he has made no mention of this matter, and that in taking a bond to protect the property of the estate of these children in the sum of five thousand dollars, would indicate that this policy was not contemplated. For all of these reasons and to meet the claim that is made here that these plaintiffs had no notice in any way and that they have not been in default, we have the right to make this showing of this conduct on the part of one who has the entire matter in charge.

The COURT.—I sustain the objection. It is not necessary to mass and pile up evidence here to prove that these children lived with their father during his lifetime, or that they lived in Seattle, or what the relations were between them and their father. Enough has already been proved and admitted to cover all that ground,

and this document as an admission against the interests of the plaintiffs is, as I think, clearly inadmissible, Is not anything that appears to have been made in direct contemplation of any such fact as that. There appears to be nothing in the paper to show that Captain Hill had this policy in mind at all in making out that paper. I sustain the objection and will allow the defendant an exception.

Mr. ALLEN.—I have still another item of testimony on the same line that I wish to present, and that is the petition of Eliza Maude Hill before the Probate Court in the matter of the guardianship and seeking and accounting of the estate telling what it consisted of and the showing of its limits and the enumeration of the only life insurance, amounting to six thousand one hundred and fifty dollars and giving the names of the companies in which it was placed, and that it had been collected and making no showing whatever in any way of any claim of any kind being thought of as being in existence at that time as late as 1893. I state this to the Court so that as these two papers are together I can have them identified and then have the ruling made upon them.

Mr. PRESTON.—If your Honor please this paper can only be offered on the theory that it is an admission of one of the plaintiffs here. Of course, as said, it would only be admissible as against her interests in this litigation. It seems there is nothing in the paper making the admission relevant to the issue. I will submit the paper

(Testimony of Sherwood Gillespy.)

to your Honor. I object to it on the ground that it is incompetent, irrelevant and immaterial.

The COURT.—I sustain the objection.

Mr. ALLEN.—In order to preserve my exception, I desire to make a statement. It is agreed by counsel that this be treated the same as if duly authenticated. There is no question made upon the authenticity of the paper presented.

The COURT.—I sustain the objection on the ground that it is incompetent and irrelevant.

Mr. ALLEN.—I would like to have the two papers fastened together and marked exhibit for identification

(Papers marked Defendant's Exhibits Nos. 15 and 16 respectively, as offered and refused.)

SHERWOOD GILLESPY, a witness called on behalf of the defendant, being duly sworn, testifies as follows:

Q. (Mr. ALLEN.) Are you in the employ of The Mutual Life Insurance Company? A. I am.

Q. How long have you been in that employ?

A. I have been with the company since 1881.

Q. You are its general agent in the State of Washington? A. Washington.

Q. Mr. Gillespy, have you been associated with the managing officers of this defendant and familiarized yourself with the course of its business since your employment with it?

A. First as an agent and afterward as a managing

(Testimony of Sherwood Gillespy.)

agent for outside work of the company, and since that with the general agency work for six years.

Q. You have been about the headquarters and associated with its managing officers?

A. Been there all my life.

Q. Mr. Gillespy, the charter of the company offered in evidence provides that certain reports shall be made periodically to the members of the company. I wish you would state if you please, to the jury, how often these reports are made.

Mr. WARBURTON.—I object as incompetent, irrelevant and immaterial. What reports this company makes to policy holders or to the insurance commissioner of New York, or to any insurance commissioner cannot affect the plaintiffs in this case.

The COURT.—Objection overruled, exception noted for the plaintiffs.

A. They issue their reports annually, showing the assets, liabilities and surplus of the company, the death claims paid and the lapses and surrenders.

Q. All of these matters are reported each year to the company. I see the charter provides every five years.

A. That was the charter.

Q. They make the same report, do they not, every year?

A. They do—ever since I have been with them.

Q. And you may state, if you know, in case a policy becomes lapsed for nonpayment of premiums, how is that

(Testimony of Sherwood Gillespy.)

noted by the company as to being a liability or not in these reports.

Mr. PRESTON.—I object for the reason last stated.

The COURT.—Objection overruled, exception noted for the plaintiffs.

A. If the policy is only in effect one year it is a lapsed policy. If for three years it has a paid up clause which is a liability for as many parts as the insured has paid premium.

Q. So that if one annual premium is paid there is no benefit to the holder of the policy beyond a one year's protection? A. That is all.

Q. The one year's insurance that he has?

Mr. PRESTON.—I renew our last objection.

The COURT.—Objection overruled, exception noted for the plaintiffs.

A. Nothing else.

Q. Now, Mr. Gillespy, you say that if the premium is not paid within one year then the policy is noted as a lapsed and forfeited policy? A. Yes, sir.

Q. And ceases to be a liability of the company in these reports? A. Yes, sir.

Q. Mr. Gillespy, in case a loss occurs and the amount of a policy is paid, from what fund is that paid?

Mr. PRESTON.—We object as incompetent, irrelevant, and immaterial.

The COURT.—Objection overruled, exception noted for the plaintiffs.

(Testimony of Sherwood Gillespy.)

A. From the reserve.

Q. What is the reserve?

A. A certain amount of money out of the premiums laid aside at 3 per cent or 3½ now. This reserve is made up of investments that are absolutely secure, as far as they can be made, and all of such claims are paid out of this reserve.

Q. That is what the reserve fund is for?

A. Yes, sir.

Q. It is the accumulation of the amount of the premium paid in and of the incomes that make it up?

A. That makes the reserve.

Mr. PRESTON.—To avoid getting confused, the witness has testified a certain percentage and now he testifies that is all.

A. The reserve is made up of a certain percentage of the premiums invested.

Mr. PRESTON.—That percentage is three or three and a half?

A. No, it is invested at three and a half per cent.

Q. What percentage is it?

A. I cannot tell the percentage.

Q. Now, Mr. Gillespy, that being the fund out of which the losses of the company are paid in case of death, if that reserve fund is not consumed by paying losses in case of death, how else is it applied?

Mr. WARBURTON.—We object as incompetent, irrelevant and immaterial.

(Testimony of Sherwood Gillespy.)

The COURT.—Objection overruled, exception noted for the plaintiffs.

A. Well, the reserve is the amount that the death losses are paid out of, and this reserve computed at three and a half per cent may make the face of the policy on the mortality table.

Q. Now, suppose the reserve is more than sufficient to pay the death losses? A. It goes into the surplus.

Q. And going into the surplus, then what is done with it?

A. Then it is divided among the persistent payers.

Q. That is, divided among all the members?

A. Persisting in paying their premiums.

Q. Persisting in paying their premiums?

A. Yes, sir.

Q. And they get that, either by credit on the premiums they pay or increasing the amount they have?

A. Increasing the amount of their insurance.

Cross-Examination.

Q. (Mr. WARBURTON.) Did I understand you, Mr. Gillespy, that policies when matured they are paid altogether out of reserve fund?

A. No, I did not say they were paid out of the reserve fund. The death losses are paid out of the reserve fund.

Q. Altogether?

A. As far as I know they are paid out of the reserve.

Q. Is it not the fact, Mr. Gillespy, that theoretically

(Testimony of Sherwood Gillespy.)

a premium is divided into three parts, a reserve, and the amount that will pay the operating expenses of the company, and then an amount which they estimate will pay the death losses which come in in that same class.

A. There is a reserve for the fund out of which death losses are paid as they occur.

Q. Now, what is the reserve, for instance, do you know what the reserve on Mr. Hill's policy $814 for a straight life policy would be?

A. No, sir, I am no actuary.

Q. Would it not be about 47 to 49 per cent?

A. I could not say.

Q. Have not you got the books to show exactly?

A. No, sir.

Q. Have you not got any showing to show the exact reserve? A. No, sir.

Q. On a policy of that date? A. No, sir.

Q. There would be a reserve?

A. There would be a reserve the first year.

Q. As an insurance agent do you know it is pretty nearly half? A. Yes, sir.

Q. Where did the other half go?

A. Commissions and doctor's fees.

Q. How about the second year then. The reserve would be the same the second year as the first?

A. I think so.

Q. Now, if it was 50 per cent, where would the other 50 per cent go?

(Testimony of Sherwood Gillespy.)

A. The reserve that is laid aside for death claims to meet the face of the policy on the expectation of life.

Q. Then about three or four dollars a thousand in addition to that is set aside for operating expenses, is it not? A. Yes, sir.

Q. And then the balance is set aside to pay death losses? A. I suppose so.

Q. Then if they are sufficient, then you do not work on the reserve at all?

A. Practically the first year's premium is eat up by expenses and commissions and fees.

Q. You do not mean to say that you could do that under the statute of New York?

A. I do not know the figures, I am only giving an estimate.

Q. Is it not a fact that the law in New York State requires a certain amount to be set aside.

A. A certain amount to come out of each premium.

Q. That applies to the first year as well as the rest?

A. Yes, sir.

Q. Then you could not use it up legally, could you?

A. For death claims.

Q. For expenses?

A. Yes, if you use it for death claims only.

Q. You could not use it for death claims?

A. Yes, sir.

Q. At the end of that policy or his life, you had to show that amount was still on hand?

A. If the policy is enforced.

(Testimony of Sherwood Gillespy.)

Q. You have got to keep a reserve at all times on hand, have you not? A. Yes, sir, certainly.

Q. Death losses come out of the balance altogether?

A. Well, as I understand it, the death losses are paid out of the reserve of the company.

Q. I understand just the contrary. That you cannot touch the reserve.

A. We only have a reserve and a surplus, that is all that we have.

Q. You only set aside forty-seven per cent—it varies from 35 to 55 per cent?

A. I do not know the amount.

Q. And the balance goes to pay death losses and operating expenses.

A. Figuring up a paid-up insurance for a party, we usually figure out seventy-five per cent reserve—the reserve is about 40 or 45 roughly.

Q. Now, to make it clear to the jury and the Court, what becomes of the first year's premium, segregate it and tell the Court and jury.

A. The first year's premium is used up for reserve and expenses.

Q. How much for reserve, about?

A. I could not say.

Q. Well, it would be about fifty per cent?

A. Might be, I could not say.

Q. Cannot be much less than that.

A. I cannot say, I do not know.

(Testimony of Sherwood Gillespy.)

Q. The balance of it goes to commissions?

A. Commissions and medical fees.

Q. How much of it is expended the first year?

A. I have no way of knowing, Mr. Warburton.

Q. You know about the commissions?

A. I know the commissions that I get; I do not know what others get.

Q. You know about what commissions are generally paid during that length of time at the head office, do you not? A. Yes.

Q. What are they?

A. Well, what do you mean, brokerage contracts or general agent's contracts.

Q. General agents?

A. Sixty-five to seventy per cent in renewals.

Q. And doctors' expenses? A. Yes, sir.

Q. To be added to that? A. Yes, sir.

Q. And then a small commission to the general agent in addition to that?

A. Yes, sir. The first premium is used up in expenses.

Q. More than taken from the policy here to pay the first year.

A. I would not say the first premium.

Q. How about the second premium?

A. That is divided into the reserve and the renewal.

Q. What percentage do you generally get on that?

A. Seven and one-half to ten per cent, but he pays the expenses.

(Testimony of Sherwood Gillespy.)

Q. He does not pay the office expenses?

A. They do.

Q. What percentage of the second premium goes into the reserve? A. I could not say.

Q. You have seen these books that show the amount of the reserve, have you not?

A. I never looked at them as to the figures.

Q. You never did? A. No, sir.

Q. You could not tell one of your policy holders the amount of reserve on his policy?

A. If he was to ask that I would ask an actuary.

Q. There are books which show exactly the amount on a policy? A. No sir.

Q. Do you know there is a book of that kind published by Mr. Fitz Hughes that is authority?

A. We have only a general reserve, we only reserve on our policies as a whole.

Q. That authority gives your reserve?

A. Not that I know of. It gives the reserve in our company as a whole. I have no way of figuring in our office the cash value of the policy. We would make an estimate and come near it, but we have no way of figuring accurately. This is always figured by the actuary for us.

Q. Can you do that yourself?

A. If I have a paid-up policy and a man asks what he can get on it, I can tell within forty or fifty dollars what he can get for it.

(Testimony of Sherwood Gillespy.)

Q. Can you tell the amount of a paid-up policy?

A. I can tell him that.

Q. Then you would have to figure the reserve, would you not? A. No, sir.

Q. On straight life?

A. On straight life, yes.

Q. You would have to figure straight life?

A. That is where I would fall down; I could not give accurate figures.

Q. You made the statement that on three annual premiums you would give the policy holder a certain amount of paid-up insurance, and that would be on the basis of the percentage the premiums would bear to the whole amount to be paid per thousand, but that is not true as to straight life?

A. That is, as to a limited endowment.

Q. It would not be true as to endowment, either, would it? A. Yes, sir.

Q. It would be about twenty or ten or thirty?

A. Ten paid.

Q. That is possibly true. But it would not be as to straight life? A. No, sir.

(Testimony of witness closed.)

Mr. ALLEN.—The defendant rests.

Mr. WARBUTON.—The plaintiffs rest.

Mr. ALLEN.—May it please the Court, at this time we feel it our duty to make a motion to your Honor to instruct the jury to return a verdict for the defendant on the whole case.

Mr. WARBURTON.—I think it would be proper to state at this time that we ask the Court to instruct the jury to return a verdict for the plaintiffs in the sum of twenty thousand dollars, together with interest from the 3d day of February, 1891, less premiums unpaid and interest unpaid.

Mr. ALLEN.—From the attitude of counsel the case has become one exclusively of law.

The COURT.—Mr. Allen, you may have your motion noted and state the grounds as fully as you wish to have your objections preserved in the record. I have thought about this case a good deal and I think it ought to be tried out fully at this time and I will submit it to the jury for a verdict. After a verdict either party may move against the verdict, move for judgment or move for a new trial, or make both motions if you want to and to make the record full for review in the Appellate Court, and I will hear your argument at that time instead of taking up time to do it now. This case has been once through the course of a law suit up to the court of final resort, been through this court and up to the Supreme Court of the United States and sent back here without having the law of the case settled. Now, a good deal of time has been consumed in this litigation to no purpose, and my object is to have your record made up so complete that if either party does take this case again up to the higher court that it will be in shape so that a final determination can then be made. I will let the jury pass upon it, and I will hear your law argument after-

wards and give you the best judgment that I am able to after hearing you fully.

Mr. ALLEN.—The defendant moves the Court to instruct the jury upon the whole case, to render a verdict in favor of the defendant. Did your Honor wish me in addition to that to particularize?

The COURT.—I think it would be well for you to do so, if you want the point in the record preserved for review in another court. I assume that if this case is taken up to the higher court after it has been fully tried out, that then directions will be given as to exactly what judgment to enter. If the Appellate Court should be of the opinion that on this whole record you are entitled to a peremptory instruction to render a judgment in your favor non instante they will so decide. My only object now is to have the record made up so that you will have your exceptions to any ruling as a basis for a review. Now you can state your grounds as fully as you want to have the record complete here to show that you do not waive anything.

Mr. ALLEN.—I would like then, may it please your Honor, to make a statement as I have made it, making the statement more complete and comprehensive and I will proceed to state some of the reasons why I ask the Court to instruct the jury upon the entire case to return a verdict in favor of the defendant.

1. Because the issue was joined as to whether the contract of insurance, the policy of insurance was made and delivered in the State of New York or the State of Wash-

ington. That all the evidence in the case is, that the contract of insurance was actually delivered at Seattle, in the State of Washington, and the first annual premium was there paid in exchange for the policy, when it was delivered to the insured, Captain George D. Hill, and that the contract thereby, under the ruling of the Supreme Court of the United States, became, as a matter of fact, a Washington contract.

2. That issue has been made as to whether the conditions of the policy were performed on the part of the insured, entitling a recovery; that it is specifically denied that either the insured or anyone on his behalf, ever paid any premiums, saving and excepting the first annual premium upon the delivery of the policy; that there is no proof whatever tending to show that any premium whatever, save the first premium on the delivery of the policy was ever paid; and that there is sufficient proof to show that nothing but the first premium ever was paid.

3. Because it is admitted in the pleadings, and stipulated by the parties, that the residence of the insured, George D. Hill, from the time of the application for the policy of insurance, down to his death, was at Seattle, Washington; and that during all of that time his post-office address was at Seattle, Washington, and that he had no post office address in the State of New York.

4. Because it is shown that the policy was actually delivered on the payment of the first annual premium at Seattle, Washington, and there became a contract under the laws of the State of Washington; and because the

policy expressly provides that no notice whatsoever, save and except that named in the policy itself shall be given of the due-date of premium. And because, also, the application itself, which was executed at Seattle, placed in the hands of the company by the applicant for insurance, contains a notice and warning that no notice is to be given of when premiums become due upon the policy, if it shall be entered into, and the application is accompanied with the form of policy, in which, as in the policy actually issued it is expressly provided that no notice whatsoever of the due-date of premiums shall be given, any statute to the contrary notwithstanding.

5. Because it is shown, and not contradicted, that at the time the second annual premium of April 29th, 1887, became due, the agent of the defendant being in possession of the renewal receipt, applied to the insured George D. Hill, to make payment of the premium then due, in exchange for the receipt, at the city of Seattle; and that he failed to do so because not in funds, and that the company again placed the renewal receipt in the hands of its agents at Seattle, who again called upon George D. Hill to make payment upon the policy, but that he failed and refused to do so, and the renewal receipt was returned to the company, because he had failed and declined to make the payment.

6. Because it is admitted in the pleadings in the case that none of the plaintiffs ever paid any premium or caused any premium to be paid after the one on the delivery of the policy, and have failed to do so, and have made claim that they were not called upon to do so, except notice was served upon them.

7. Because, in the whole transaction of this insurance so far as dealing with the premiums is concerned and meeting the conditions of the policy, George D. Hill acted for all parties, and notice to him and knowledge on his part, failure or omission on his part, was notice, knowledge, or failure as the case may be, on the part of all the plaintiffs in this case; and they cannot have the benefit of this policy of insurance upon the life of George D. Hill and this contract made with him except by ratifying his conduct and being controlled and governed by his conduct in regard to the policy, and whatever would bind him or estop him or terminate the contract, so far as he is concerned, has the same effect with them.

8. Because in this case it is proven that the defendant company is a mutual life insurance company or association, whose membership consists of its persistent policy holders and that the burden of paying losses falls upon the persistent or policy performing members of the company; and that where, as in this case, there were four consecutive years allowed to pass without the payment of any premium or part of a premium whatever on the policy, the plaintiffs, the beneficiaries in this case, not having paid or offered to pay, or in any way make good the liability for premiums, cannot recover from the company, or the other members of the company, upon the policy which has been in default, as shown in this case for a period of four years and upon which a single annual payment was made.

9. Because if the statute of New York in any manner affects the policy of insurance in this case, and the ques-

tion of notice of the due-date of premiums, it does so solely by the convention of the parties and not by operation of law, and the parties have expressly agreed that the statute, such statute in regard to notice, shall not apply to this policy.

10. Because this case, as made by the complainants rests upon compliance with the terms and conditions of the policy of insurance and not upon any failure of the defendant to comply with the statute of New York relative to the giving of notice of the due-date of premium. The allegation in the pleadings being that the ground of recovery is that the insured beneficiaries performed the conditions of the contract of insurance.

11. Because there is a variance between the case pleaded and the case set up and relied upon by the plaintiff in departing from the contract of insurance and performance of its conditions as a ground of recovery, and abandonment of that ground of recovery, that claim of recovery, because of the failure to give the statutory notice prescribed by the statute of New York.

12. Because the notice under the statute of New York and the statute of itself, has reference to the forfeiture of premiums already paid on the policies and the advantages accruing therefrom or the reserves thereon and to nothing else; that such were the only things capable of forfeiture.

Now, upon the general ground that I have made, as well as upon these enumerated grounds, may it please your Honor, I ask the Court to instruct the jury to find a verdict in favor of the defendant.

The COURT.—The motion is denied and an exception is asked and noted for the defendant.

EXCEPTION NO. 2.

(As applicable to this exception, and that of all instructions requested and refused, it is stated that each of said requested instructions was in writing and was requested immediately upon the conclusion of the testimony and before argument to the jury, and while the jury were in the box, and that exception in giving each of said instructions was duly taken and allowed in open court in the presence of the jury, and before it had retired to consider of its verdict.)

Refusal of the Court to give defendant's requested instruction No. 1 as follows:

"I.

"The Court instructs the jury as a matter of fact the contract of insurance sued on did not become an existing contract until it was delivered to the insured George D. Hill at Seattle, Washington, when and where the first annual premium was paid, but it was, at the time when this contract came into being, agreed by and between the parties that it should be construed to be made in New York City, but it was at the same time agreed between the contracting parties that no statute, whether of New York or elsewhere, should require any notice to be given of when any premium on the policy fell due, but that the policy itself afforded the notice and all the notice of the date at which the premiums fell due, to wit, on the 29th day of April, 1887, and the same day

of each succeeding year during the continuance of the policy, and if not so paid the policy should terminate and become void. It is denied by the answer that any part of the premium falling due April 29th, 1887, was ever paid. If this premium was not paid then the policy became forfeited and ended, and the plaintiffs have no right to recover. The Court instructs you there is no evidence before you that this premium falling due April 29th, 1887 or any part of it, or any subsequent premium, was ever paid, but on the contrary the evidence is that such premium was not paid."

The evidence is undisputed that the policy of insurance was delivered at Seattle, Washington, at the time when the first premium was paid. The undisputed evidence is that no other than this first premium was ever paid upon said policy; that the insured, George Dana Hill, died in the State of Washington, December 4, 1896.

EXCEPTION NO. 3.

Refusal of the Court to give defendant's requested instruction No. II, as follows:

"II.

"The plaintiffs in this case admit that aside from the first premium paid in 1886 upon the delivery of the policy none of them have ever paid any premium upon this policy. The answer denies that any premium save the first upon the delivery of the policy was ever paid by anyone. The Court instructs you there is no evidence in the case tending to show that any premium, save the first annual premium paid upon the delivery

of the policy, ever has been paid, while on the contrary there is evidence tending to show that no such premium ever has been paid, and upon this state of facts you should render a verdict in favor of the defendant."

The plaintiffs in this case admit that aside from the first annual premium paid in 1886, upon the delivery of the policy, none of them have ever paid any premium upon this policy.

The same facts apply to this as to exception No. 2, and the evidence is that it is a conceded fact there was a default in the premium falling due April, 1887, and every subsequent year, to the death of the insured in December, 1890.

EXCEPTION NO. 4.

Refusal of the Court to give defendant's requested instruction No. III as follows:

"III.

"The Court instructs you that there is no evidence in this case tending to show that the insured George D. Hill, at any time from the time of making his application for the policy sued on in April, 1886, to his death, December 4, 1890, had any postoffice address in the State of New York, but on the contrary it is stipulated and agreed by the parties that during all of that time his postoffice address was at the city of Seattle in the State of Washington. The Court instructs you as a matter of law that the defendant was not required by any statute of the State of New York, or elsewhere to serve a notice of the date when the premium became due upon the insured George D. Hill, except he had a postoffice

address in the State of New York, and as the Court has advised you, there is no evidence that he had a postoffice address in the State of New York, or anywhere, save in the city of Seattle, State of Washington."

EXCEPTION NO. 5.

Refusal of the Court to give the defendant's requested instruction No. IV, as follows:

"IV.

"The Court instructs you that if the insured, George D. Hill failed to pay the premiums upon the policy sued upon, falling due on the 29th day of April, 1887, the 29th day of April, 1888, the 29th day of April, 1889, and the 29th day of April, 1890, then he abandoned the contract and the same became terminated, and there would be no right on the part of these plaintiffs to recover, and your verdict in such case should be in favor of the defendant. The Court instructs you that there is no evidence tending to show that said George D. Hill, or anyone, paid any of the premiums for any or all of these four years, but there is evidence tending to show that he did not, and that such premiums were not paid."

The evidence as before stated is that default was made in the payment of the premiums falling due in April, 1887, 1888, 1889 and 1890, and is also undisputed that a local agent of defendant presented its official receipt for the second annual premium when it became due and requested payment and held the receipt for a time for payment, and upon nonpayment returned the same to the general office of the company at San Francisco, in the State of California, which again sent the

receipt to the local agent and he again presented it and gave him opportunity to make payment. But no further premium was ever paid. The evidence is also to the effect that all of said plaintiffs who were minors, resided in the home of the insured George Dana Hill at Seattle, Washington, as members of his family until the time of his death in December, 1890.

EXCEPTION NO. 6.

Refusal of the Court to give defendant's requested instruction No. V, as follows:

"V.

"The Court instructs you that the plaintiffs in this case rely for their recovery upon a performance of the conditions on their part or that of the insured, as the ground of their right to recover, and that one of the conditions upon which such right of recovery rests is that the premiums falling due on the 29th day of April, 1887, and on that day of each succeeding year during the life of said Hill, which ended December 4, 1890, were paid. The Court further instructs you that there is no evidence whatever tending to show that any of said premiums were ever paid or caused to be paid, and under the case as made by plaintiffs, recovery cannot be had for failure on the part of the insurance company to comply with any statute of the State of New York relative to giving notice as to when the premium or premiums fell due. To allow the plaintiffs to recover because of failure to give notice under the statute of New York would be what in law is termed a departure in pleading which cannot be permitted.

Va. The Court instructs you that in matters relating to the payment of premiums upon this policy the insured George D. Hill was the agent or trustee of the plaintiffs, with full power to bind them in that respect, and any failure, omission or act on his part to make payment of a premium or premiums as the same became due, became their failure, omission or act."

The evidence applicable to this is as in the foregoing exception, and in their pleadings each of the plaintiffs admit their failure and omission to make payment of any premium. The proof is that the policy of insurance was delivered to George Dana Hill. There is no evidence that it went out of his custody or control during his lifetime.

It was proved that all the plaintiffs lived with their father during his lifetime at Seattle and were under his parental care during such time.

EXCEPTION NO. 7.

Refusal to give defendant's requested instruction No. VI, as follows:

"VI.

"The Court instructs you that the defendant in this case is a mutual life insurance company or association, whose membership consists of what in law is known as its 'persistent policy holders,' that is, the policy holders of the company keeping up their policies by the payment of premiums as falling due, and if you find that the premiums on the policy in suit falling due Apri 29, 1887, 1888, 1889, and 1890, were not paid and have not

been paid, and the Court further instructs you that there is no evidence that any of the same have paid paid, then the Court instructs you your verdict should be in favor of the defendant."

The proof is undisputed that the defendant is a mutual life insurance association depending upon the payment of premiums by its members for the means with which to meet its obligations to its persistent policy holders and that no other than the first premium had been paid upon the policy in suit, and that no offer or tender of payment of any delinquent premium had been made up to the time of trial.

EXCEPTION NO. 8.

Refusal to give defendant's requested instruction No. VII, as follows:

"VII.

"The Court instructs you there is no statute of New York, nor any law, requiring or directing the defendant insurance company to give any notice to any of the plaintiffs in this case as to when premium upon the policy sued upon became due. Plaintiffs had the right, however, by virtue of their interest in the policy, to have paid any premium at the time it fell due, and the defendant would have been bound to accept it. It would have been the duty of the plaintiffs, or any of them, to have made tender of the amount of the premium at the time it fell due, to the company or some of its authorized agents. There is no proof, however, that any such tender was made, but upon the contrary the pleadings

admit that none of the plaintiffs ever did pay or cause to be paid any such premium."

EXCEPTION NO. 9.

Refusal to give defendant's requested instruction No. VIII, as follows:

"VIII.

"Upon all the evidence in the case gentlemen of the jury, the Court instructs you to find a verdict in favor of the defendant."

EXCEPTION NO. 10.

Error on the part of the Court in giving the following instruction to the jury, excepted to at the time by defendant:

"Now, a refusal implies an affirmative act with knowledge and with an opportunity to act. It is not synonymous with omission; a mere omission to pay the premiums has no such effect, but the defense that is interposed here is that these plaintiffs with knowledge that the premiums were due and were unpaid, refused to pay them and that is the question which I submit for you to decide, whether the evidence proves that there was any such affirmative act on the part of the plaintiff in this case as would amount to a refusal to pay the premiums, or whether there was any expressed contract or agreement since the delivery of the policy which amounts to an agreement on their part to surrender the policy or abrogate the contract."

EXCEPTION NO. 11.

Error on the part of the Court in giving the following instruction, excepted to at the time by defendant:

"There is another question which I submit to the jury, and that is, whether Captain Hill himself, whose life was insured, abrogated this contract by any agreement on his part to surrender or avoid it. He was not the agent or the trustee of the plaintiffs and his act would not be an equivalent to their act but the contract was made by him, and his failure to pay the premium, if it was known to the plaintiffs and was acquiesced in by them and ratified by them, would be an abrogation of the contract. His act, not especially authorized or ratified, would not have that effect."

EXCEPTION NO. 12.

Error on the part of the Court in giving the following instruction, excepted to at the time by defendant:

"If you find from the evidence that there was any affirmative act on the part of these plaintiffs or any act of their father, that was approved and ratified by them, which abrogated this contract in any way, your verdict would be for the defendant. If there was no such subsequent abrogation of the contract, your verdict would be for the plaintiff and you will return a verdict in favor of the plaintiffs in the sum of twenty-nine thousand and twenty dollars."

EXCEPTION NO. 13.

Error of the Court in refusing to sustain defendant's motion for a new trial on the ground that the verdict was contrary to the law and the evidence.

EXCEPTION NO. 14.

Error on the part of the Court in refusing to sustain

the motion of defendant for judgment in its favor, notwithstanding the verdict returned in said cause.

The following is in full the Court's charge to the jury:

"CHARGE OF COURT TO JURY:

"The COURT.—Gentlemen of the Jury: This is an action brought by the plaintiffs, who are the children and heirs of George Dana Hill, to recover the amount of insurance upon the life of George Dana Hill, written by the defendant company in the policy described in their complaint.

"It is conceded that the defendant's company issued the policy and received payment of the first annual premium. The issuing and delivering of the policy and the receipt of the premium put the contract in force so that it became a binding obligation upon the defendant company. By the terms of the policy the company insured the life of George Dana Hill for the period of one year, for the amount of money which it received, and it also insured his life and became liable to pay to his wife, if living, or otherwise to his children, if she did not survive him, the amount of the insurance at the time of his death, upon the condition that the annual premiums should be kept paid. There was as much obligation on the part of the beneficiaries in this policy to pay the insurance company the annual premiums provided for, as there was upon the part of the defendant company to pay the insurance at Captain Hill's death.

"It is also a conceded fact in the case that no other premium was ever paid to the company except the first one, and that there was a default made in the payment

of premiums, which accrued on the 29th day of April, 1887, and on the same date in 1888, and the same date in 1889, and the same date in 1890.

"Ordinarily, where parties are free to make their own contracts according to the disposition of their own minds, a contract, conditional, as this one is, would be terminated as to the rights of the defaulting party and as to the obligation of the adverse party, by a breach of the conditions of the contract as there has been in this case, but there is a question in this case as to whether the rights of these plaintiffs are not saved by a provision in the statutes of New York which was in force during the time intervening between the issuance of the policy and the death of Captain Hill, which denied to the insurance company the right to claim a forfeiture for nonpayment of premiums or to claim that the policy had lapsed because of the nonpayment of premiums, unless the company proceeded in a manner provided specially by the statute for giving notice containing specific declarations provided in the statute, which notice had to be sent to the person whose life was insured, by mail, at least thirty days before a forfeiture could be claimed. Now, that question, whether the rights of the parties are saved or not by this statute is a question which the Court reserves for future consideration. It is a fact that one of the contracting parties resided in the State of Washington and that the home office of this defendant company is in New York, and that the transactions between them by which a contract was finally consummated, was partly in the State of Washington and part-

ly in the State of New York, and because of the transactions being thus partly in one State and partly in another, there is a question in the case whether the law of New York, by reason of its own force, did have any controlling effect in the case; and the parties have, in the contract itself, made certain stipulations which leave a question which has not yet been passed upon by the supreme court of the United States in this case, or any other case, and that question as to the effect of the stipulation of the parties in this contract, is one which the Court reserves for future consideration.

"Now, the Court assumes, in submitting the case to you, that the rights of the plaintiffs are saved by the New York statute, unless the contract has been abrogated by the conduct of the plaintiffs since the policy was issued.

"One of the defenses set up in the defendant's answer is, that these plaintiffs neglected and refused to pay the premiums. A refusal on their part would constitute a complete bar of their right to recover in this case. If they have refused to pay the premium then that amounts to a complete abrogation of the contract itself.

"Now, a refusal implies an affirmative act with knowledge and with an opportunity to act. It is not synonymous with omission. A mere omission to pay the premium has no such effect, but the defense that is interposed here is that these plaintiffs with knowledge that the premiums were due and were unpaid refused to pay them, and that is the question which I submit for you

to decide, whether the evidence proves that there was any such affirmative act on the part of the plaintiffs in this case as would amount to a refusal to pay the premiums or whether there was any express contract or agreement since the delivery of the policy, which amounts to an agreement on their part to surrender the policy or abrogate the contract.

"There is another question which I submit to the jury, and that is whether Captain Hill himself, whose life was insured, abrogated this contract by any agreement on his part to surrender or avoid it. He was not the agent or trustee of the plaintiffs and his act would not be an equivalent to their act, but the contract was made by him; and his failure to pay the premium, if it was known to the plaintiffs and was acquiesced in by them and ratified by them, would be an abrogation of the contract. His act, not especially authorized or ratified would not have that effect.

"If you find from the evidence that there was any affirmative act on the part of these plaintiffs or any act of their father that was approved and ratified by them, which abrogated this contract in any way, your verdict will be for the defendant. If there was no such subsequent abrogation of the contract your verdict will be for the plaintiff and you will return a verdict in favor of the plaintiffs in the sum of $29,020.

"I submit to you two forms of verdict. Whichever conforms to your decision in the case will be signed by your foreman and brought into court as your verdict in the case.

"You may retire, gentlemen."

(Before the retirement of the jury the defendant took the foregoing exceptions to the refusal of the Court to give instructions requested by the defendant and to each of the foregoing instructions given by the Court.)

After being instructed the jury retired and afterwards returned with a verdict in favor of the plaintiffs for the sum of $29,020.00 (twenty-nine thousand and twenty dollars).

The foregoing constitutes the testimony and a statement of all the evidence introduced and offered upon the trial of this cause, and of all the proceedings upon said trial from the coming of the jury to the rendition of the verdict.

And now in furtherance of justice and that right may be done, the defendant presents the foregoing as its bill of exceptions in this case, and prays that the same may be settled and allowed and signed and certified by the Judge, as provided by law.

R. C. STRUDWICK and
STRUVE, ALLEN, HUGHES & McMICKEN,
Attorneys for Defendant.

It is stipulated, that the foregoing bill of exceptions presented by defendant, contains the testimony, and a statement of all of the evidence introduced and offered upon the trial of said cause, and of all the proceedings had upon said trial, from the coming of the jury to the rendition of judgment therein and that the same is satisfactory in form and may be settled and allowed, and signed and certified by the Judge of said Court, as provided by law.

It is further stipulated that the original exhibit "A," being the application, shall be transmitted with and form a part of this bill of exceptions, without being physically attached to it.

Dated February 25th, 1902.

STRUVE, ALLEN, HUGHES & McMICKEN, and
R. C. STRUDWICK,

Attorneys for Plaintiffs.

STANTON WARBURTON, and
PRESTON, CARR & GILMAN,

Attorneys for Defendant.

The foregoing bill of exceptions, containing the testimony and a statement of all the evidence introduced and offered upon the trial of said cause, and of all the proceedings had therein from the coming of the jury to the rendition of the judgment, and being by the stipulation of the parties agreed to as a true and correct bill of exceptions, is hereby approved allowed, and settled, and made a part of the record herein.

Dated this 25th day of February, 1902, the January, 1902, term and done in open court.

C. H. HANFORD,
Judge.

[Endorsed]: Bill of Exceptions. Filed in the United States Circuit Court, District of Washington. February 25, 1902. A. Reeves Ayres, Clerk. R. M. Hopkins, Deputy.

In the Circuit Court of the United States, District of Washington, Northern Division.

ELIZA MAUD HILL, GEORGE E. HILL, ELLEN KELLOGG HILL, and EUGENE C. HILL, by His Guardian ad Litem, EBEN SMITH,

Plaintiffs,

vs.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,

Defendant.

No. 511.

Petition for Writ of Error.

The Mutual Life Insurance Company of New York, a corporation, defendant in the above-entitled action, feeling itself aggrieved by the verdict of the jury and the judgment entered on the 30th day of January, 1902, in said cause, comes now by Messrs. Struve, Allen, Hughes & McMicken and R. C. Strudwick, Esq., its attorneys, and petitions said Court for an order allowing said defendant to prosecute a writ of error to the Honorable the United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided; and also that an order may be made fixing the amount of security which the defendant shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in this court be suspended and

stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit, and your petitioner will ever pray.

R. C. STRUDWICK,
STRUVE, ALLEN, HUGHES & McMICKEN,
Attorneys for Defendant.

Due service of the foregoing petition acknowledged at Seattle Washington, the 25th day of February, 1902.

S. WARBURTON and
PRESTON, CARR & GILMAN,
Attorneys for Plaintiffs.

[Endorsed]: Petition for Writ of Error. Filed in the United States Circuit Court, District of Washington. February 25, 1902. A. Reeves Ayres, Clerk. R. M. Hopkins, Deputy.

In the Circuit Court of the United States, District of Washington, Northern Division.

ELIZA MAUD HILL, GEORGE E. HILL, ELLEN KELLOGG HILL, and EUGENE C. HILL, by His Guardian ad Litem, EBEN SMITH,

Plaintiffs,

vs.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,

Defendant.

No. 511.

Assignment of Errors.

Comes now the above-named defendant, and feeling itself aggrieved by the judgment entered in this cause against it, and in favor of said plaintiffs, and being desirous of having sued out a writ of error to the Circuit Court of Appeals, and being about to petition for the issuance of such writ of error, files the following assignment of errors upon which it will rely for the reversal of said judgment.

I.

That the United States Circuit Court in and for the District of Washington, Northern Division, erred in denying the motion of the defendant after plaintiff and de-

fendant had rested their respective cases and before argument to the jury that the Court direct the jury to return a verdict in favor of the defendant.

II.

That the said trial court erred in denying the motion of defendant (made after plaintiff and defendant had rested their cases and before argument to the jury) that the Court direct the jury to return a verdict for the defendant upon the ground that the contract of insurance sued upon was delivered in, and the first annual premium thereon paid, in the State of Washington, and was a Washington contract; and that no other premium was paid after the delivery of the policy and during the lifetime of the insured, George Dana Hill, because it was admitted and stipulated that the insured, George Dana Hill, resided and had his postoffice address at Seattle, Washington, from the date of the policy in April, 1886, to his death in December, 1890, and had no postoffice address in the State of New York, because the policy introduced in evidence provides that no notice whatsoever as to the due-date of premiums shall be required or given other than the mention of the date of payment fixed in the policy, and that upon failure to pay as in the policy provided, the contract of insurance becomes void; because it was shown by uncontradicted testimony that when the second annual premium of April 29, 1887, became due upon the policy sued upon, the agent of defendant being in possession of the renewal receipt, personally applied to the insured George Dana Hill to make

payment of the premium, and though frequently requested so to do the said Hill failed, neglected and refused to make payment and permitted and allowed the said policy to lapse and become terminated; and because defendant had acted upon the said conduct of Hill and treated the policy of insurance as terminated after April 29, 1887, because it is admitted in the pleadings that each and all of the plaintiffs have failed and omitted to make payment of any premium upon said policy; because notice and demand of payment of premium and neglect, failure and refusal on the part of George Dana Hill is notice and demand upon the plaintiffs, and his neglect, failure, and refusal to pay was that of plaintiff; because it is alleged and proven that defendant is a mutual life insurance company and the plaintiffs without paying or offering to pay, have neither paid nor offered to pay any of the defaulted premiums for the years 1887, 1888, 1889 and 1890; because plaintiffs under their pleadings claimed performance of the terms and conditions of the policy upon their part, and that of the insured, and failed to show compliance in the payment of premiums, but on the contrary the evidence is undisputed that but one premium was paid upon said policy. Because of the total variance between the case pleaded by plaintiffs and the proofs and the entire want of proof to sustain plaintiff's case. Because the statute of New York has no application to the case as made, and has reference to the forfeiture of premiums already paid upon policies and the advantages accruing therefrom, and not to the nonpayment of premiums.

III.

Error of the Court in refusing to give the jury the following instruction requested by defendant plaintiff in error:

"The Court instructs the jury as a matter of fact that the contract of insurance sued on did not become an existing contract until it was delivered to the insured George D. Hill at Seattle, Washington, when and where the first annual premium was paid, but it was, at the time when this contract came into being, agreed by and between the parties that it should be construed to be made in New York City, but it was at the same time agreed between the contracting parties, that no statute, whether of New York or elsewhere, should require any notice to be given of when any premium on the policy fell due, but that the policy itself afforded the notice and all the notice of the date at which the premium fell due, to wit, on the 29th day of April, 1887, and the same day of each succeeding year during the continuance of the policy, and if not so paid the policy should terminate and become void. It is denied by the answer that any part of the premium falling due April 29th, 1887, was ever paid. If this premium was not paid then the policy became forfeited and ended, and the plaintiffs have no right to recover. The Court instructs you there is no evidence before you that this premium falling due April 29th, 1887, or any part of it, or any subsequent premium, was ever paid, but on the contrary the evidence is that such premium was not paid."

IV.

The Court erred in refusing to give to the jury the following instruction requested by defendant, plaintiff in error:

"The plaintiffs in this case admit that aside from the first premium paid in 1886 upon the delivery of the policy, none of them have ever paid any premium upon this policy. The answer denies that any premium save the first upon the delivery of the policy was ever paid by anyone. The Court instructs you there is no evidence in the case tending to show that any premium, save the first annual premium paid upon the delivery of the policy, ever has been paid; while on the contrary there is evidence tending to show that no such premium ever has been paid, and upon this state of facts you should render a verdict in favor of the defendant."

V.

The Court erred in refusing to give the jury the following instruction requested by defendant, plaintiff in error:

"The Court instructs you that there is no evidence in this case tending to show that the insured George D. Hill, at any time from the time of making his application for the policy sued on in April, 1886, to his death, December 4, 1890, had any postoffice address in the State of New York, but on the contrary it is stipulated and agreed by the parties that during all of that time his postoffice address was at the city of Seattle in the State of Washington. The Court instructs you as a matter of law that the defendant was not required by any statute of the State of New York, or elsewhere, to serve a notice

of the date when the premium became due upon the insured George D. Hill, except he had a postoffice address in the State of New York, and as the Court has advised you, there is no evidence that he had a postoffice address in the State of New York or elsewhere save in the city of Seattle, State of Washington."

VI.

The Court erred in refusing to give the jury the following instruction requested by defendant, plaintiff in error:

"The Court instructs you that if the insured George D. Hill failed to pay the premiums upon the policy sued upon, falling due on the 29th day of April, 1887, the 29th day of April 1888, the 29th day of April, 1889, and the 29th day of April, 1890, then he abandoned the contract and the same became terminated, and there would be no right on the part of these plaintiffs to recover, and your verdict in such case should be in favor of the defendant. The Court instructs you that there is no evidence tending to show that said George D. Hill, or anyone, paid any of the premiums for any or all of these four years, but there is evidence tending to show that he did not, and that such premiums were not paid."

VIII.

The Court erred in refusing to give the following instruction to the jury requested by defendant, plaintiff in error:

"The Court instructs you that the plaintiffs in this case rely for their recovery upon a performance of the

conditions on their part or that of the insured, as the ground of their right to recover, and that one of the conditions upon which such right of recovery rests is that the premiums falling due on the 29th day of April, 1887, and on that day of each succeeding year during the life of said Hill, which ended December 4, 1890, were paid. The Court further instructs you that there is no evidence whatever tending to show that any of said premiums were ever paid, or caused to be paid, and under the case as made by plaintiffs, recovery cannot be had for failure on the part of the Insurance Company to comply with any statute of the State of New York relative to giving notice as to when the premium or premiums fell due. To allow the plaintiffs to recover because of failure to give notice under the statute of New York, would be what in law is termed a departure in pleading which cannot be permitted. Va. The Court instructs you that in matters relating to the payment of premiums upon this policy the insured George D. Hill was the agent or trustee of the plaintiffs, with full power to bind them in that respect, and any failure, omission or act on his part to make payment of a premium or premiums as the same became due, became their failure, omission or act."

VIII.

The Court erred in refusing to give to the jury the following instruction requested by defendant, plaintiff in error:

"The Court instructs you that the defendant in this case is a Mutual Life Insurance Company or Association, whose membership consists of what in law is known as

its 'persistent policy holders,' that is, the policy holders of the company keeping up their policies by the payment of premiums as falling due and if you find that the premiums on the policy in suit falling due April 29, 1887, 1888, 1889 and 1890, were not paid and have not been paid, and the Court further instructs you that there is no evidence that any of the same have been paid, then the Court instructs you that your verdict should be in favor of the defendant."

IX.

The Court erred in refusing to give to the jury the following instruction requested by defendant, plaintiff in error:

"The Court instructs you there is no statute of New York, nor any law, requiring or directing the defendant insurance company to give any notice to any of the plaintiffs in this case as to when any premium upon the policy sued upon became due. Plaintiffs had the right, however, by virtue of their interest in the policy, to have paid any premium at the time it fell due, and the defendant would have been bound to accept it. It would have been the duty of the plaintiffs, or any of them, to have made tender of the amount of the premium at the time it fell due, to the company or some of its authorized agents. There is no proof, however, that any such tender was made, but, on the contrary, the pleadings admit that none of the plaintiffs ever did pay or cause to be paid any such premium."

X.

The Court erred in refusing to give to the jury the following instruction requested by defendant, plaintiff in error:

"Upon all the evidence in the case, gentlemen of the jury, the Court instructs you to find a verdict in favor of the defendant."

XI.

The Court erred in giving the following instruction during the course of its charge to the jury:

"Now, a refusal implies an affirmative act, with knowledge and with an opportunity to act. It is not synonymous with omission. A mere omission to pay the premiums has no such effect, but the defense that is interposed here is that these plaintiffs, with knowledge that the premiums were due and were unpaid, refused to pay them, and that is the question which I submit for you to decide, whether the evidence proves that there was any such affirmative act on the part of the plaintiffs in this case as would amount to a refusal to pay the premiums, or whether there was any expressed contract or agreement since the delivery of the policy which amounts to an agreement on their part to surrender the policy or abrogate the contract."

XII.

The Court erred in giving the following instruction in its charge to the jury:

"There is another question which I submit to the jury, and that is, whether Captain Hill himself, whose life was insured, abrogated this contract by any agreement on his part to surrender or avoid it. He was not the agent or the trustee of the plaintiffs, and his act would not be an equivalent to their act, but the contract was made by him, and his failure to pay the premium, if it was known to the plaintiffs, and was acquiesced in by them, and ratified by them, would be an abrogation of the contract. His act, not especially authorized or ratified, would not have that effect."

XIII.

The Court erred in giving the following instruction in its charge to the jury:

"If you find from the evidence that there was any affirmative act on the part of these plaintiffs, or any act of their father, that was approved and ratified by them, which abrogated this contract in any way, your verdict would be for the defendant. If there was no such subsequent abrogation of the contract, your verdict would be for the plaintiff in the sum of twenty-nine thousand and twenty dollars."

XIV.

The Court erred in overruling the motion of defendant and plaintiff in error for a new trial, on the ground that the said verdict was contrary to law, was not supported by the evidence, and on account of the erroneous instruc-

tions given by the Court to the jury, and the failure to give instructions requested by defendant and plaintiff in error.

XV.

Error committed by the trial court in refusing to grant the motion of defendant and plaintiff in error for judgment in its favor dismissing said action, notwithstanding the verdict in favor of plaintiff.

XVI.

Error committed by the trial court in rendering judgment in favor of plaintiff and against defendant, appealed from, or in rendering any judgment in favor of plaintiffs.

R. C. STRUDWICK, and
STRUVE, ALLEN, HUGHES & McMICKEN,
Attorneys for Defendant and Plaintiff in Error.

Service of the foregoing assignment of errors acknowledged at Seattle, Washington, February 25th, 1902.

S. WARBURTON and
PRESTON, CARR & GILMAN,
Attorneys for Plaintiffs.

[Endorsed]: Assignment of Errors. Filed in the United States Circuit Court, District of Washington. February 25, 1902. A. Reeves Ayres, Clerk. R. M. Hopkins, Deputy.

In the Circuit Court of the United States, District of Washington, Northern Division.

ELIZA MAUD HILL, GEORGE E HILL, ELLEN KELLOGG HILL, and EUGENE C. HILL, by His Guardian ad Litem, EBEN SMITH,

Plaintiffs,

vs.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,

Defendant.

No. 511.

Order Allowing Writ of Error.

Upon motion of Messrs. Struve, Allen, Hughes & McMicken and R. C. Strudwick, Esq., attorneys for the defendant, and upon filing a petition for a writ of error and an assignment of errors, it is

Ordered that a writ of error be, and hereby is, allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit, a judgment heretofore made and entered herein, and that the amount of bond on said writ of error be and hereby is fixed at thirty-five thousand dollars; and that upon the execution and approval of said bond, a supersedeas be allowed.

C. H. HANFORD,

United States District Judge, and One of the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, Presiding at the Court for the District of Washington.

[Endorsed]: Order Allowing Writ of Error. Filed in the United States Circuit Court, District of Washington. February 25, 1902. A. Reeves Ayres, Clerk. R. M. Hopkins, Deputy.

In the Circuit Court of the United States, District of Washington, Northern Division.

ELIZA MAUD HILL, GEORGE E. HILL, ELLEN KELLOGG HILL, and EUGENE C. HILL, by His Guardian ad Litem, EBEN SMITH,

Plaintiffs,

vs.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,

Defendant.

No. 511.

Supersedeas Bond.

Know all men by these presents, that The Mutual Life Insurance Company of New York, a corporation, defendant above named, as principal, and Jacob Furth and J. S. Goldsmith as sureties, are held and firmly bound unto the above-named plaintiffs, Eliza Maud Hill, George E. Hill, Ellen Kellogg Hill, and Eugene C. Hill, by his guardian ad litem, Eben Smith, and each of them, in the full and just sum of thirty-five thousand dollars ($35,000.00), to be paid to the said above-named plaintiffs, and each of them,

his, her, or their executors or administrators, to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our successors, representatives, heirs, executors or administrators, jointly and separately, firmly by these presents.

Sealed with our seals and dated this 25th day of February, 1902.

Whereas, lately at a session of the Circuit Court of the United States for the District of Washington, Northern Division, in a suit pending in said court between said plaintiffs and the said defendant, a final judgment was rendered against the said defendant and in favor of said plaintiffs, and the said defendant, The Mutual Life Insurance Company of New York having obtained from said Court a writ of error to reverse the judgment in the aforesaid suit, and a citation directed to said plaintiffs is about to be issued, citing and admonishing them, and each of them, to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, California.

And now, the condition of the above obligation is such that if the said The Mutual Life Insurance Company of New York shall prosecute its writ of error to effect, and shall answer all damages and costs that may be awarded against it (including therein all just damages for delay, cost and interest on appeal, if it shall fail to make its ap-

peal good), then the above obligation to be void; otherwise to remain in full force and effect.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,

By JOHN B. ALLEN,

Its Attorney, and

SHERWOOD GILLESPY, [Seal]

Its Agent.

JACOB FURTH. [Seal]

J. S. GOLDSMITH. [Seal]

The within bond, and the sufficiency of the sureties therein, is hereby approved this 25th day of February, 1902.

C. H. HANFORD,

Judge.

No objection to form of bond or sufficiency of sureties.

S. WARBURTON, and

PRESTON, CARR & GILMAN,

Attorneys for Defendants in Error.

State of Washington, }
County of King. } ss.

Jacob Furth and J. S. Goldsmith, being severally sworn, says: He is a citizen, resident, and householder in said State and county, and one of the sureties on the foregoing supersedeas bond, and is worth the sum of twenty thousand dollars over and above his debts and liabilities, exclusive of property exempt from execution.

JACOB FURTH.

J. S. GOLDSMITH.

Subscribed and sworn to before me this 25th day of February, 1902.

[Notarial Seal] H. J. RAMSEY,
Notary Public in and for the State of Washington, Residing at Seattle.

[Endorsed]: Supersedeas Bond. Filed in the United States Circuit Court, District of Washington. February 25, 1902. A. Reeves Ayres, Clerk. R. M. Hopkins, Deputy.

In the Circuit Court of the United States, for the District of Washington, Northern Division.

ELIZA MAUD HILL, GEORGE E. HILL, ELLEN KELLOGG HILL, and EUGENE C. HILL, by His Guardian ad Litem, EBEN SMITH,
Plaintiffs,

vs.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Defendant.

Clerk's Certificate to Transcript.

United States of America,
District of Washington. } ss.

I, A. Reeves Ayres, clerk of the Circuit Court of the United States for the District of Washington, do hereby

certify the foregoing one hundred and fifty-nine (159) typewritten pages, numbered from 1 to 159, inclusive, to be a full, true, and correct copy of the record and proceedings in the above and therein-entitled cause, as the same remains of record and on file in the office of the clerk of said court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is the sum of $56.30, and that said amount has been paid to me by Struve, Allen, Hughes & McMicken, attorneys for plaintiff in error, The Mutual Life Insurance Company of New York.

In testimony whereof I have hereunto set my hand and affixed the seal of said Circuit Court, this 18th day of March, 1902.

[Seal.] A. REEVES AYRES,

Clerk United States Circuit Court, District of Washington,

By R. M. Hopkins,

Deputy Clerk of said Court.

Writ of Error.

UNITED STATES OF AMERICA.

The President of the United States of America, to the Honorable, the Judges of the Circuit Court of the United States, for the District of Washington, Northern Division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said

Circuit Court before you, or some of you, between The Mutual Life Insurance Company of New York, a corporation, plaintiff in error, and Eliza Maud Hill, George E. Hill, Ellen Kellogg Hill, and Eugene C. Hill by his guardian ad litem Eben Smith, defendants in error, a manifest error hath happened to the damage of the said The Mutual Life Insurance Company of New York, a corporation, plaintiff in error, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so as to have the same at said place in said Circuit Court not exceeding thirty days from the date of the signing of the citation herein, to wit, not exceeding thirty days from the 25th day of February, 1902. That the record and proceedings aforesaid, being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct those errors, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, the 25th

day of February, in the year of our Lord one thousand nine hundred and two.

A. REEVES AYRES,
Clerk of the United States Circuit Court for the Ninth Circuit Court, District of Washington, Northern Division.

By R. M. Hopkins,
Deputy.

Allowed by:
[Seal]

C. H. HANFORD,
District Judge.

Service of the foregoing writ of error and receipt of a copy thereof is hereby admitted at Seattle, Washington, this 25th day of February, 1902.

S. WARBURTON and
PRESTON, CARR & GILMAN,
Attorneys for Defendants in Error and Plaintiffs in the Lower Court.

Received this 25th day of February, 1902, a true copy of the foregoing writ of error for said defendants in error.

[Seal] A. REEVES AYRES,
Clerk of the Circuit Court of the United States for the Ninth Circuit, District of Washington, Northern Division.

By R. M. Hopkins,
Deputy Clerk.

[Endorsed]: Original. No. 511. In the United States Circuit Court, District of Washington, Northern Division. Eliza Maud Hill, George E. Hill, Ellen Kellogg Hill and

Eugene C. Hill, by His Guardian ad Litem, Plaintiffs, vs. The Mutual Life Insurance Company of New York, Defendant. Writ of Error. Filed in the United States Circuit Court, District of Washington. February 25, 1902. A. Reeves Ayres, Clerk. R. M. Hopkins, Deputy.

Citation.

UNITED STATES OF AMERICA.

The President of the United States, to Eliza Maud Hill, George E. Hill, Ellen Kellogg Hill, and Eugene C. Hill, by His Guardian ad Litem, Eben Smith, and to Each of Them, and to Messrs. Preston, Carr & Gilman, and S. Warburton, Their Attorneys:

You and each of you are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco in the State of California, within thirty days from the date of this citation, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the District of Washington, Northern Division, wherein the Mutual Life Insurance Company of New York is plaintiff in error and you are defendants in error, to show cause, if any there be why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States

of America, this 25th day of February, 1902, and of the Independence of the United States the one hundred and twenty-sixth.

C. H. HANFORD,

United States District Judge, presiding in the Circuit Court.

Attest:

[Seal] A. REEVES AYRES,

Clerk.

By R. M. Hopkins,

Deputy.

Due service of the foregoing citation acknowledged at Seattle, Washington, February 25th, 1902.

S. WARBURTON and

PRESTON, CARR & GILMAN,

Attorneys for Defendants in Error and Plaintiffs below.

[Endorsed]: Original. No. 511. In the United States Circuit Court, District of Washington, Northern Division. Eliza Maud Hill, George E. Hill, Ellen Kellogg Hill, and Eugene C. Hill, by His Guardian ad Litem, Plaintiffs, vs. The Mutual Life Insurance Company of New York, Defendant. Citation. Filed in the United States Circuit Court, District of Washington. February 25, 1902. A. Reeves Ayres, Clerk. R. M. Hopkins, Deputy.

[Endorsed]: No. 813. In the United States Circuit Court of Appeals for the Ninth Circuit. The Mutual Life Insurance Company of New York, Plaintiff in Error, vs. Eliza Maud Hill, George E. Hill, Ellen Kellogg Hill, and Eugene C. Hill, by His Guardian ad Litem, Eben Smith, Defendants in Error. Transcript of Record. Upon Writ of Error to the United States Circuit Court for the District of Washington, Northern Division.

Filed March 22, 1902.

F. D. MONCKTON,

Clerk.

15480

PROCEEDINGS

HAD IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

At a stated term, to wit, the October term A. D. 1901, of the United States Circuit Court of Appeals for the Ninth Circuit, held at the courtroom, in the city and county of San Francisco, on Wednesday, the fourteenth day of May, in the year of our Lord one thousand nine hundred and two. Present: The Honorable WILLIAM B. GILBERT, Circuit Judge; Honorable ERSKINE M. ROSS, Circuit Judge; Honorable WILLIAM W. MORROW, Circuit Judge.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Plaintiff in Error,
vs.
ELIZA MAUD HILL et al.,
Defendants in Error.
No. 813.

Order of Submission.

Ordered cause argued by E. S. Pillsbury and John B. Allen, Esquires, counsel for the plaintiff in error, and Stanton Warburton, Esquire, counsel for the defendants in error, and submitted to the Court for consideration and decision, with leave to Mr. Pillsbury to print and file his argument within twenty (20) days from date.

In the United States Circuit Court of Appeals for the Ninth Circuit.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Plaintiff in Error,
vs.
ELIZA MAUD HILL, GEORGE E. HILL, ELLEN KELLOGG HILL, and EUGENE C. HILL, by His Guardian ad Litem, Eben Smith,
Defendants in Error.
No. 813.

Opinion of United States Circuit Court of Appeals.

This is an action to recover the amount of a life insurance policy, brought by the defendants in error, as beneficiaries under said policy, against the plaintiff in error, the company issuing the policy.

The case is before this Court for the second time, having been removed to the Supreme Court of the United States after the first hearing, upon certiorari, and by that Court certified back to the Circuit Court of the United States for the District of Washington, with a mandate for further proceedings. Upon such proceedings being had, an appeal was again taken to this court.

On April 29, 1886, the plaintiff in error issued its policy of insurance upon the life of George Dana Hill, in the sum of $20,000, in favor of his wife, Ellen Kellogg Hill, if she were living at the time of his death, or in case of her death, to the children of their bodies who should be living at the time of the death of the insured. The first annual premium, amounting to $814, was paid by the insured upon delivery of the policy to him at Seattle, Washington, to the agent of the insurance company at that place. The wife died in February, 1887, and the insured died on December 4, 1890. No further premiums were paid upon the policy after the first annual preimum. It appears from the evidence that when the next annual premium became due the Seattle agent of the insurance company called upon Hill for payment of the same, presenting a renewal receipt duly executed by the head officials of the company; that Hill did not pay the premium, and after repeated opportunities for payment having been given and not availed of, the agent at Seattle returned the renewal receipt to the general office of the company at San Francisco; that the head of the latter office, out of special interest in the case, returned the renewal receipt to the agent at Seattle, and it was again presented to Hill and payment requested; that Hill failed and declined to make payment, and the renewal receipt was returned to San Francisco and thence to the home office in New York, where the policy was noted as lapsed and terminated. No offer or tender of payment of premium was later made by anyone upon the policy. Upon the death of Hill the

defendants in error, children of the said Hill and his wife and named as beneficiaries in the policy, furnished proper proof of the death of the said Hill, and demanded of the plaintiff in error the payment of the amount of the policy. In support of their claim the defendants in error contended that the insured was not in default in the payment of premiums on said policy until a notice had been mailed to him pursuant to the statute of New York requiring notices to be given by insurance companies transacting business in that State; that according to the agreement contained in the application for insurance and contract of insurance the terms of said contract were to be performed in New York, and all questions as to the validity of the provisions of said contract, and as to the rights and liabilities of the parties thereto, must be determined in accordance with the laws of New York; that under such laws the plaintiff in error had no power to cancel the policy or claim a forfeiture without giving the statutory notice; that by reason of the failure to give such notice the premiums did not become due, and there was no default.

The plaintiff in error (defendant below) denied that the conditions of the contract of insurance had ever been performed by the insured, and contested the claim that the contract of insurance was to be performed in New York or was subject to the laws of New York. It contended that it was transacting its business in the State of Washington at the time of the issuance of the policy, having its principal office in Seattle in said State; that the insured was at that time a citizen

of Washington, residing therein; that he made application for insurance of the Seattle agent; that this application was transmitted to the agent of the company at San Francisco, and by him forwarded to the home office at New York; that pursuant to the application, the company issued the policy; sent it to the agent in San Francisco, who afterward transmitted it to the agent in Seattle; that the insured there paid the first premium, and received the policy. And in response to the contention that there was no default on the part of the insured, it was alleged that at a time more than one year from the time of the issuance of the policy it was mutually agreed between the insured and the insurance company that the said contract of insurance should be waived; abandoned, and rescinded. It was contended that this agreement was made up of the acts of the agent of the insurance company at Seattle in notifying the insured that the premium of $814 necessary to be paid upon said policy for its continuance was due and payable, and of the acts of the insured in informing said agent that he was unable to pay such premium, and intended to allow the policy to lapse and become forfeited for want of payment of said premium, or any future premium accruing on said policy; and it was alleged that the insurance company, in good faith relying upon said conduct and representations of the insured, was induced to, and did, fail and abstain from giving or mailing any notice to the insured, or to any person interested in said policy, concerning the payment of any premium thereon.

Demurrers to the answer were sustained, and upon the election of the plaintiff in error to stand upon its pleadings, a judgment was given upon the pleadings, in favor of the beneficiaries, for $24,086.61, with interest and costs. The Circuit Court of Appeals affirmed this judgment, holding that the contract of insurance must be considered as made in the State of New York and subject to the laws of the State. (97 Fed. 263, 267.)

Upon appeal to the Supreme Court of the United States that court held that the answer of the defendant disclosed a distinct agreement on the part of the insured and the company to waive and abandon the policy and all rights and obligations on the part of the parties thereto, and that upon the allegation of the insurance company that "each and all the plaintiffs (including the beneficiaries) neglected and refused to pay" the premium due on said policy, the beneficiaries were also parties to the abandonment of the policy, and had no rights remaining thereunder. The judgments of the Circuit Court of Appeals and if the Circuit Court were reversed, and the case remanded to the Circuit Court with instructions to overrule the demurrers to the answer of the insurance company. (178 U. S. 347.) In accordance with this mandate, the case was reinstated in the Circuit Court for the District of Washington, brought to trial and submitted to a jury for decision upon the question whether the insured himself abrogated the contract by any agreement on his part to surrender or avoid it, and if so, whether there was knowledge of such agreement by the beneficiaries, or whether there was any

act on the part of the beneficiaries amounting to a refusal to pay the premiums, or to surrender the policy or abrogate the contract. The jury found a verdict in favor of the beneficiaries in the sum of $29,020, and from that verdict the insurance company again brings the case to this court upon writ of error.

Julien T. Davies, E. S. Pillsbury, Edward Lyman Short, John B. Allen and Wm. H. Chickering, Attorneys for Plaintiff in Error.

S Warburton, Harold Preston, and Eben Smith, Attorneys for the Defendants in Error.

Before GILBERT, ROSS and MORROW, Circuit Judges.

MORROW, Circuit Judge, after stating the facts as above, delivered the opinion of the Court.

The assignment of errors relate to the refusal of the Court to give certain instructions requested by the plaintiff in error, to the giving of other instructions by the Court, and to the refusal of the Court to grant a motion by the plaintiff in error for a judgment in its favor notwithstanding the verdict.

Upon the former hearing it was held by this Court that the policy of insurance in controversy was a New York contract, according to its terms, and that the Laws of New York of 1877, chapter 321, section 1, providing that no insurance company shall declare a policy forfeited for nonpayment of premiums without having first given the assured thirty days' notice that the premiums were due and that the policy would be forfeited if they

were not paid, were mandatory; also, that under such a policy the rights of the beneficiaries could not be affected by an attempted waiver of the statute by the assured, or by other than their own act and agreement. The judgment of this Court was reversed upon the ground that the answer of the defendant (plaintiff in error), alleged that the insured and the company had agreed to abandon and terminate the contract of insurance, and that the beneficiaries (plaintiffs below) "had failed, neglected and refused to pay the second premium," thus refusing to continue the policy. This allegation of the answer, it was said, "disclosed a distinct agreement on the part of the insured and the company to waive and abandon the policy and all rights and obligations on the part of the parties thereto." (Mutual Life Ins. Co. v. Hill, 178 U. S. 347, 350.) The case was sent back to the Circuit Court for trial on this question alone, the Supreme Court saying, in its opinion, that it was an interesting question how far the action of the insured could affect or bind the beneficiaries in a life insurance policy, but that under the allegations of the answer above stated it was unnecessary to examine that question. The plaintiffs (defendants in error) by their replication denied these allegations of the answer, and the case was brought to trial on the issues thus made. Upon the second trial it appeared by the testimony of each of the defendants in error, including the guardian, that not one of them had knowledge of the nonpayment of the premium, and that they had never refused to pay the same. The jury found a verdict for the plaintiffs (defendants in error), upon which judgment was entered.

This question of fact relating to the alleged abandonment of the contract on the part of the beneficiaries was thus disposed of in their favor.

The decision of this Court upon all other points not having been criticised or reversed by the Supreme Court, is now the law of the case for this Court. (Kankakee Coal Co. et al., Impleaded, vs. Crane Bros. Mfg. Co., 38 Ill. App. Ct. Rep. 555; Matthews vs. Bank, 100 Fed. 397; Texas & Pacific Ry. vs. Wilder, 101 Fed. 198.)

It is contended, however, that with respect to the opinion of this Court that the contract of insurance must be considered as having been made in the State of New York and subject to the laws of that State, this Court has in effect been reversed by the Supreme Court of the United States in the case of Mutual Life Ins. Co. vs. Cohen, 179 U. S. 262. Let us see if that is so.

The contract in the present case was made up of the application on the part of the insured and the policy issued by the company pursuant to the application, and the obligations of the respective parties are defined therein. The application contains the following clause: "It is agreed that * * * the contract of insurance when made shall be held and construed at all times and places to have been made in the city of New York." In the policy issued in compliance with this application appears the following statement: "In consideration of the application for this policy, which is hereby made a part of this contract, The Mutual Life Insurance Company of New York promises to pay at its home office in the city of New York, unto Ellen Kellogg Hill," etc. The con-

tract was thus by the express agreement of the parties made subject to the laws of New York, and governable by them. In the Cohen case the Supreme Court gave particular attention to the question of what law should control a contract of insurance made by the insurance company in New York with an individual in the State of Washington. The application in that case contained a stipulation that it (the application) was made subject to the charter of the company and the laws of the State of New York. It was held that while such a stipulation in the application is not tantamount to a stipulation that the policy issued thereon shall also in like manner be controlled, a provision that the contract issued upon such application should, when made, be in all respects controlled by the laws of New York, incorporates those laws into the terms of the contract, and the contract is then controlled by such laws. Reference was made to the case of Baxter vs. Brooklyn Life Ins. Co., 119 N. Y. 450, as an example, where a stipulation appeared in the application for the policy that it was "a contract made and to be executed in the State of New York and construed only according to the laws of that State." The case was distinguished from the Cohen case because of the fact that the application in the Cohen case recited merely that the application was "subject to the charter of the company and the laws of the State of New York." This application was held to be but a preliminary instrument, containing such a stipulation in order to prevent a local suit as to the effect of statements or representations or any other matter in the application

from overriding the provisions of the charter and the laws of the State. No reference to the contract, when completed, was made in the application and it was held that under those conditions the laws of New York did not apply to the question of forfeiture. In the present case, however, the stipulation in the application is identical in substance with that appearing in the Baxter case (119 N. Y. 450), containing the agreement that the contract when made should be held and construed at all times and places to have been made in the city of New York. The policy issued was pursuant to that application, and the agreements contained in the application became a part of the completed contract. The decision of the Supreme Court in the Cohen case is not, therefore, a reversal of the decision of this court in the present case, but, on the contrary, it is clearly to be construed as in accord with our decision; and so construed, we must hold that the contract in the present case is controlled by the laws of the State of New York. By those laws no forfeiture could occur until the statutory notice had been given to the insured. This notice was not given, either to the insured or to the beneficiaries. Hence the policy was still in force at the time of the death of the insured, and the beneficiaries entitled to recover thereon.

Attention has been called to the decision of this court in the case of Mutual Life Ins. Co. vs. Hathway et al., 45 C. C. A. 655, 106 Fed. 815. It is only necessary to say that in that case the facts presented were identical with those in the Cohen case, the application containing the

same stipulation. The case was therefore governed by the decision of the Supreme Court in the Cohen case, and is clearly distinguished from the one now under consideration. Here the completed contract was made subject to the laws of New York; there the application merely was subject to the charter of the company and the laws of New York.

The action of the Court below appears to have been in accord with the law herein stated, and the judgment is therefore affirmed.

[Endorsed]: Opinion. Filed Oct. 6, 1902. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Plaintiff in Error,
vs.
ELIZA MAUD HILL, GEORGE E. HILL, ELLEN KELLOGG HILL and EUGENE C. HILL, by His Guardian ad Litem, Eben Smith,
Defendants in Error.
No. 813.

Judgment of U. S. Circuit Court of Appeals.

In error to the Circuit Court of the United States for the District of Washington, Northern Division.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States

for the District of Washington, Northern Division, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said Circuit Court in this cause be, and the same is hereby, affirmed, with costs.

[Endorsed]: Judgment. Filed and entered October 6, 1902. F. D. Monckton, Clerk.

At a stated term, to wit, the October term A. D. 1902, of the United States Circuit Court of Appeals for the Ninth Circuit, held at the courtroom, in the city and county of San Francisco, on Wednesday, the twelfth day of November, in the year of our Lord one thousand nine hundred and two. Present: The Honorable WILLIAM B. GILBERT, Circuit Judge; Honorable ERSKINE M. ROSS, Circuit Judge; Honorable WILLIAM W. MORROW, Circuit Judge.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Plaintiff in Error,
vs.
ELIZA MAUD HILL et al.,
Defendants in Error.
No. 813.

Order Staying Mandate.

Upon motion of Warren Gregory, Esquire, on behalf of counsel for the plaintiff in error, ordered issuance of mandate herein stayed thirty (30) days from date.

In the United States Circuit Court of Appeals for the Ninth Circuit.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Plaintiff in Error,
vs.
ELIZA MAUD HILL, GEORGE E. HILL, ELLEN KELLOGG HILL and EUGENE C. HILL, by His Guardian ad Litem, Eben Smith,
Defendants in Error.
No. 813.

Certificate of Clerk C. C. A. to Transcript.

I, Frank D. Monckton, Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing two hundred and seven (207), pages, numbered from one (1) to two hundred and seven (207), inclusive, to be a true copy of the entire record in the above-entitled case in the said United States Circuit Court of Appeals for the Ninth Circuit as the same remains of record in my office.

Attest my hand and the seal of said United States Circuit Court of Appeals at San Francisco, California, this 19th day of November, A. D. 1902.

[Seal] F. D. MONCKTON,
Clerk.

UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the ninth circuit, Greeting:

Being informed that there is now pending before you a suit in which The Mutual Life Insurance Company of New York is plaintiff in error, and Eliza Maud Hill, George E. Hill, Ellen Kellogg Hill, and Eugene C. Hill, by his guardian *ad litem*, Eben Smith, are defendants in error, which suit was removed into the said circuit court of appeals by virtue of a writ of error to the circuit court of the United States for the district of Washington, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 28th day of February, in the year of our Lord one thousand nine hundred and three.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

[Endorsed:] No. 813. C. C. A. File No. 18,746. Supreme Court of the United States. No. 518, October term, 1902. The Mutual Life Ins. Co., of New York, *vs.* Eliza Maud Hill *et al.* No. 813. United States circuit court of appeals for the ninth circuit Writ of certiorari. Filed March 20, 1903. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

United States Circuit Court of Appeals for the Ninth Circuit.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Plaintiff in Error,
vs.
ELIZA MAUD HILL, GEORGE E. HILL, ELLEN KELLOGG HILL, and Eugene C. Hill, by His Guardian *ad Litem*, Eben Smith, Defendants in Error.

Stipulation.

It is hereby stipulated and agreed by and between the parties to the above-entitled cause, acting by their respective attorneys of record, that the transcript of record in the above cause heretofore

certified by the clerk of the court of appeals and docketed in the Supreme Court of the United States as No. 518 on the calendar for the October term 1902 on petition for certiorari shall stand as the return by the circuit court of appeals to the writ of certiorari issued by the Supreme Court of the United States on the 28th day of February, A. D. 1903 in the above-entitled cause.

JULIEN T. DAVIES,
EDWARD LYMAN SHORT,
E. S. PILLSBURY,
W. H. CHICKERING,
E. C. HUGHES,
Attorney- for Plaintiff in Error.
STANTON WARBURTON AND
HAROLD PRESTON,
Attorney- for Defendants in Error.

(Endorsed :) Stipulation as to return to writ of certiorari. Filed, March 20, 1903, F. D. Monckton, clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Plaintiff in Error,
v.
ELIZA MAUD HILL, GEORGE E. HILL, ELLEN KELLOGG HILL, and Eugene C. Hill, by His Guardian *ad Litem*, Eben Smith, Defendants in Error.

Certificate of Clerk C. C. A. to Stipulation.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the next preceding page to be a true copy of a stipulation as to return to writ of certiorari filed in the above-entitled cause on March 20, 1903, as the original thereof remains on file and of record in my office.

Attest my hand and the seal of said United States circuit court of appeals for the ninth circuit, at San Francisco, California, this 21st day of March, A. D. 1903.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON.

United States Circuit Court of Appeals for the Ninth Circuit.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Plaintiff in Error,
v.
ELIZE MAUD HILL, GEORGE C. HILL, ELLEN KELLOGG Hill, and Eugene C. Hill, by his Guardian *ad Litem*, Eben Smith, Defendants in Error. } No. 813.

Certificate of Clerk Circuit Court of Appeals upon Return to Writ of Certiorari.

By direction of the honorable the judges of the United States circuit court of appeals for the ninth circuit I, Frank D. Monckton, clerk, in obedience to the annexed writ of certiorari issued out of the honorable the Supreme Court of the United States and addressed to the honorable the judges of the United States circuit court of appeals for the ninth circuit, commanding them to transmit to the said Supreme Court the record and proceedings in the above entitled cause, do attach to the said writ a certified copy of a stipulation entered into between the counsel for the respective parties to the said cause and filed on the 20th day of March, A. D. 1903, the original of which stipulation is of record in my office, and do hereby certify the same as due return to the said writ.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said the United States circuit court of appeals for the ninth circuit, at San Francisco, California, this 21st day of March, A. D. 1903.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

[Endorsed:] File No. 18,746. Supreme Court U. S., October term, 1902. Term No. 518. The Mutual Life Insurance Co. of New York, pet'r, *vs.* Eliza Maud Hill *et al.* Writ of certiorari and return. Filed March 26", 1903.

15491

IN THE

Supreme Court of the United States

OCTOBER TERM, 1902

Ex Parte THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a corporation, Petitioner.

Petition for Writ of Certiorari requiring the Circuit Court of Appeals for the Ninth Circuit to certify to the Supreme Court for its review and determination, the case of THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Plaintiff in Error, vs. ELIZA MAUD HILL, GEORGE E. HILL, ELLEN KELLOGG HILL and EUGENE C. HILL by his Guardian EBEN SMITH, Defendants in Error.

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

The Petitioner, The Mutual Life Insurance Company of New York, a corporation, respectfully shows to this Honorable Court, as follows:

I.

That your petitioner is a mutual life insurance corporation or society, chartered and created under and by vir-

tue of an act of the legislature of the state of New York of April 12th, 1842, entitled: "An Act to incorporate The Mutual Life Insurance Company of New York," and a citizen of said state, with its principal office in the state of New York.

That in the year 1876, the legislature of the state of New York enacted a general statute entitled: "An Act regulating the forfeiture of life insurance policies" (Laws 1876, Chap. 341), as follows:

"Section 1. No life insurance company doing business in the state of New York shall have power to declare forfeited or lapsed any policy hereafter issued or renewed by reason of non-payment of any annual premium or interest, or any portion thereof, except as hereinafter provided. Whenever any premium or interest due upon any such policy shall remain unpaid when due, a written or printed notice stating the amount of such premium or interest due on such policy, the place where said premium or interest shall be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is assured, or the assignee of the policy, if notice of the assignment has been given to the company, at his or her last known postoffice address, postage paid by the company, or by an agent of such company or person appointed by it to collect such premium. Such notice shall further state that unless the said premium or interest then due shall be paid to the company or to a duly appointed agent or other person authorized to collect such premium within thirty days after the mailing of such notice, the said policy and all payments thereon will become forfeited and void. In case the payment demanded by such notice shall be made within the thirty days limited therefor. the same shall be taken to be in full compliance with the requirements of the policy in respect to the payment of said premium or interest, anything therein contained to the

contrary notwithstanding; but no such policy shall in any case be forfeited or declared forfeited or lapsed until the expiration of thirty days after the mailing of such notice. Provided, however, that a notice stating when the premium will fall due, and that if not paid the policy and all payments thereon will become forfeited and void, served in the manner hereinbefore provided, at least thirty and not more than sixty days prior to the day when the premium is payable, shall have the same effect as the service of the notice hereinbefore provided for."

And thereafter in the year 1877, the said legislature of the state of New York amended the same as follows:

"The affidavit of any one authorized by section one to mail such notice, that the same was duly addressed to the person whose life is assured by the policy, or to the assignee of the policy, if notice of the assignment has been given to the company, in pursuance of said section, shall be presumptive evidence of such notice having been given."

That prior, at the time of, and subsequent to the 29th day of April, 1886, there was in force and effect in the territory of Washington, a statute as follows:

"Sec. 2478. All corporations now existing or hereafter formed under the laws of other states or territories of the United States for the conducting and transacting of marine, life and fire insurance, or any other business not inconsistent with the organic law of this territory, shall have full power and authority to sue and be sued, hold, purchase and acquire, sell and dispose of real and personal property, and generally to do and perform any and every act, and transact business within this territory, in the same manner and to the same extent as though such corporation had been organized under the laws of this territory."
(Code of Washington, 1881):

and that said statute has remained in force from and since the admission of the state of Washington.

That prior to, upon, and subsequent to said date, your petitioner was transacting its said life insurance business in the territory of Washington, in full compliance with the statutes of said territory relating to foreign corporations transacting business therein, having its principal office for the transaction of said business in said territory, at Seattle.

II.

Your petitioner states that prior to the 29th day of April, 1886, and until his death on December 4th, 1890, one George Dana Hill resided at said city of Seattle and was a citizen of the then territory and since November 11, 1889, state of Washington. That shortly before the 29th day of April, 1886, the said George Dana Hill at said Seattle, made the usual application in writing for a policy of life insurance upon his life to your petitioner, in the sum of twenty thousand dollars. That said application contained the statement that the residence and postoffice address of said George Dana Hill was the city of Seattle, and that he had no purpose of changing the same. It further stated that he was a married man and the name of the person to whom the insurance should be payable in case of his death should be his wife, Ellen Kellogg Hill, but in event she should not be living at the time of its maturity, to the children of their marriage. The said application contained a statement that it was made to The Mutual Life Insurance Company of New York, subject to the charter of said company and the laws of said state, and after enumerating the usual statements and answers com-

mon in such applications, closed with the following paragraph:

"It is hereby declared and warranted that all the statements and answers as above made are complete and true, and that they, together with this declaration and agreement, constitute an application to The Mutual Life Insurance Company of New York for a policy of insurance, and are offered as a consideration for the policy hereby applied for. And it is agreed that there shall be no contract of insurance until a policy shall have been issued and delivered by said company, and the first premium thereon paid while the person proposed for insurance is in the same condition of health described in this application; and if said policy be issued, the declarations, agreements, and warranties herein contained shall be a part thereof; and the contract of insurance when made shall be held and construed at all times and places to have been made in the city of New York. It is agreed that in any distribution of surplus, the principles and methods which may be adopted by the company for such distribution, and its determination of the amount equitably belonging to such policy, shall be and are hereby ratified and accepted by and for every person who shall have or claim any interest under said policy. It is also agreed that prompt notice of the death of the insured shall be given to the company, and formal proofs thereof, in accordance with the rules of the company, shall be furnished within one year after the said death.

Dated at Seattle, Tery. of Wash., the twenty-eighth day of April, 1886."

That after signing such application said George Dana Hill, at Seattle, delivered it to the agent of your petitioner at said Seattle, and after the medical examination of said George Dana Hill at Seattle, the agent of your petitioner at Seattle, transmitted the said application by mail to

Andrew B. Forbes at San Francisco, California, he being the general agent of your petitioner in the state of California, where the principal office of your petitioner on the Pacific Coast was situated. The said Forbes caused said application to be mailed to your petitioner at New York City. That your petitioner upon said application, executed its policy of life insurance to said George Dana Hill in New York City, bearing date April 29th, 1886, and caused the same to be forwarded by mail to said Andrew B. Forbes, its general agent at San Francisco, who re-mailed the same to the local agent of your petitioner at Seattle in the territory of Washington, and that said George Dana Hill, at said Seattle, shortly after that date, paid the first premium of eight hundred and fourteen dollars to your petitioner, and at the same time your petitioner, through its local agent at Seattle, delivered said policy of life insurance to said George Dana Hill. The following, excepting the provisions of the contract, not in any wise affecting this case, is substantially a copy of said policy of insurance:

"THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

Wife's Life,
Age 46 Years.
Annual
Premium,
$814.

Five Year Distribution Policy,
Amount, $20,000.

In consideration of the application for this policy, which is hereby made a part of this contract, the Mutual Life Insurance Company of New York promises to pay at its home office in the city of New York, unto Ellen Kellogg Hill, wife of George Dana Hill, of Seattle, in the

county of King, Washington Territory, for her sole use, if living, in conformity with the statute, and if not living, to such of the children of their bodies as shall be living at the death of the said wife, or to their guardian for their use, twenty thousand dollars; upon acceptance of satisfactory proofs at its said office, of the death of said George Dana Hill during the continuance of this policy, upon the following condition; and subject to the provisions, requirements and benefits stated on the back of this policy, which are hereby referred to and made part thereof;

The annual premium of eight hundred and fourteen dollars and ..... cents shall be paid in advance on the delivery of this policy, and thereafter to the company at its home office in the city of New York, on the twenty-ninth day of April in every year during the continuance of this contract.

In witness whereof, the said The Mutual Life Insurance Company of New York has caused this policy to be signed by its president and secretary, at its office in the city of New York, the twenty-ninth day of April, A. D. one thousand eight hundred and eighty-six.

RICHARD A. McCURDY,
President.

W. J. EASTON,
Secretary."

Among the provisions and conditions on the back of the policy was the following:

"PROVISIONS, REQUIREMENTS AND BENEFITS.

Payment of Premiums.—Each premium is due and payable at the home office of the company in the city of New York; but will be accepted elsewhere when duly made in exchange for the company's receipt, signed by the president or secretary. Notice that each and every such payment is due at the date named in the policy, is given and

accepted by the delivery and acceptance of this policy, and any further notice, required by any statute is thereby expressly waived. That part of the year's premium, if any, which is not due and is unpaid at the maturity of this contract, shall be deducted from the amount of the claim. If this policy shall become void by non payment of premium, all payments previously made shall be forfeited to the company, except as hereinafter provided."

That shortly before the 29th day of April, 1886, when the second annual premium on said policy became due, your petitioner placed the renewal receipt therefor in the custody of its local agent at Seattle, and authorized him to deliver the same to the insured upon payment of such premium. That said George Dana Hill was at that time residing and continued to reside and have his place of business and his post office address at said city of Seattle. That on the said 29th day of April, 1887, the said agent personally informed the said George Dana Hill of such fact, and requested payment of the said premium, offering said renewal receipt in exchange therefor; that said Hill expressed himself to said agent as being unable to make the payment, and after repeated efforts to collect the premium, said agent returned the renewal receipt to the San Francisco office. The general agent at San Francisco again transmitted the receipt in order to afford further opportunity to said Hill to make payment, but upon such receipt being by the local agent at Seattle again presented to Hill with request for payment, he failed to make such payment, whereupon the receipt was returned through the San Francisco office to the home office of the company at New York City, and the policy entered upon the books of the company as lapsed, terminated and for-

feited, and thus the matter remained during the life of said George Dana Hill.

III.

Your petitioner shows that said Ellen Kellogg Hill, wife of said George Dana Hill, died at Seattle, Washington, February 14th, 1887; that said George Dana Hill, the insured, died at said Seattle on December 4th, 1890, leaving Eliza Maud Hill, George E. Hill, Ellen Kellogg Hill and Eugene C. Hill, children of the bodies of said Ellen Kellogg Hill and George Dana Hill, all of whom at the time of the death of said George Dana Hill were minors, and all of whom from their birth until his death, resided in the home of said George Dana Hill at Seattle, Washington, as members of his family, and under his parental care and guardianship.

IV.

Your petitioner further states that on the 19th day of October, 1895, George E. Hill and such of the others of said defendants in error as were of age, and those who were minors by their guardian, Eben Smith, brought suit against your petitioner to recover the amount of said policy, with interest, in the United States Circuit Court for the District of Washington, Northern Division, being No. 511, and in their amended complaint set forth the said policy and alleged compliance with its terms and conditions on the part of the said George Dana Hill during his life time, and subsequently by the said defendants in error. Your petitioner in said action admitted in its answer to said amended complaint, the execution and delivery of said policy, but denied compliance with its provisions by said George Dana Hill in his life time, or any

one on his behalf, and also denied compliance with any of the provisions of said policy on the part of the said defendants in error. Your petitioner further denied that said policy had been delivered or became a contract in the state of New York or elsewhere than in the state of Washington, where it was delivered and the first premium paid. Your petitioner averred in its answer that said George Dana Hill had failed, neglected and refused to pay the premium, or any part of it, falling due April 29th, 1887, and that no premium except the first annual premium had been paid on said policy from the time of its delivery to the time of the death of said George Dana Hill, December 4th, 1890, and that no tender or offer of payment of any premium had been made prior to or during the pendency of said action, by the said defendants in error or any one on their behalf. Your petitioner also affirmatively pleaded that there became due your petitioner as a premium on said policy, April 29th, 1887, the sum of eight hundred and fourteen dollars, and that said George Dana Hill and said Ellen Kellogg Hill, his wife, and each of the plaintiffs, failed, neglected and refused to make payment of the same, or any part thereof, and that ever since, and by reason of such neglect, refusal and default, the policy of insurance lapsed, terminated and became of no effect. Your said petitioner also affirmatively pleaded that it was a mutual life association, chartered under the laws of the state of New York, whose membership consisted of its persistent premium paying policy-holders. That at the time of the delivery of said policy and subsequent thereto, it had large numbers of outstanding policies, and its membership consisted of many thousands of persons whose lives were insured by defendant in various sums,

and that during all times your petitioner was dependent upon the proceeds of the funds arising from the payment of the premiums of its policy-holders, to meet its death losses, and in order to meet its liabilities and discharge its duties to its members, it was necessary that every member of the association make payment of his or her premiums, and also to make such payment as the same respectively became due; that but a single annual premium had been paid upon said policy. That defendants in error had not at any time paid or offered to pay any part of the premiums upon the policy of said George Dana Hill for the years 1887, 1888, 1889 and 1890, and that by reason thereof defendants in error were estopped from claiming the said policy to be an existing contract, or from claiming any right of recovery thereon by reason of the death of said George Dana Hill.

Your petitioner further in said action pleaded that at a time more than one year from the date of the issuance of said policy and more than one year from the 29th day of April, 1886, and during the life time of said George Dana Hill, it was mutually agreed between your petitioner and the said George Dana Hill that the said contract of insurance should be, and it was, waived, abandoned and rescinded, and that said George Dana Hill and your petitioner, by mutual consent, abandoned and rescinded said policy of insurance and all obligations thereunder. Your petitioner also affirmatively pleaded in said action that on the 29th day of April, 1887, in writing, and also personally, through its local agent at Seattle, it notified and informed the said George Dana Hill that the premium of eight hundred and fourteen dollars was due, and demanded payment, at the same time making tender to said

George Dana Hill of the usual renewal receipt of your petitioner upon such payment, and said George Dana Hill, being so advised and requested to make payment, failed, neglected and refused to do so, and at the time of presenting said receipt and demanding payment, said Hill informed your petitioner he was unable to make such payment and did not intend to pay the same, or the premiums thereafter to accrue upon said policy; that your petitioner then and there and ever since relied upon said conduct and representations of said George Dana Hill, and was thereby induced to, and did, declare the policy terminated and abandoned, and relying upon such conduct and representations upon the part of said George Dana Hill, your petitioner was induced to, and did thereafter refrain and abstain from giving or mailing, or attempting to give or mail, any further notice or demand whatsoever upon said Hill, for the payment of any premium upon said policy, and for such reason abstained from giving any notice to said George Dana Hill on account thereof.

Your petitioner also pleaded as a defense in said action, the character and purpose of its corporate being as aforesaid, its membership and its dependence upon the proceeds of premiums upon its policies for funds with which to pay its death losses, and meet its financial liabilities; and that agreeably to the requirements of its charter and its rules and regulations, on the 31st day of December, in every year, it heretofore has and does ascertain the amount of its liabilities, and that such liabilities depend upon the policies in force, issued by your petitioner. That your petitioner makes such ascertainment of liabilities and makes statement thereof, to its policy-holders, for their information, benefit and protection, and to the public at

large from whom it seeks insurance, and that such had during all said times, been its practice. That after said George Dana Hill had failed to pay the annual premium falling due April 29th, 1887, your petitioner had caused the said policy to be entered upon its records as lapsed, and terminated, and did not include the same as a liability in said ascertainment and statement to its policy-holders, and never since said time had included or reported the said policy as among its liabilities. That the premium-paying policy-holders of your petitioner have at all times acted upon the faith of the said statements of liabilities, and persons becoming members of your petitioner taking out policies since the said 29th day of April, 1887, have also been induced to and have relied upon the correctness of your petitioner's statement of liabilities, and have been induced to believe and have believed that the said Hill policy became lapsed and terminated April 29th, 1887, and did not since said time constitute a liability of your petitioner. That the said George Dana Hill as a member of your petitioner was advised of the said facts. That the larger part of the single premium of eight hundred and fourteen dollars paid upon the said policy was absorbed and expended in payment of fees and commissions to agents, examiners and other expenses pertaining to the obtaining and issuing of said policy. That there never was in fact or in equity any thing or fund by way of surplus, accretion or otherwise, due or owing upon the said policy issued to said George Dana Hill, and that the said policy had not contributed in any manner to the reserve fund of your petitioner, out of which death losses were paid, and that for said reason the demand of defendants in error tended to the disorganization of your peti-

tioner's business, was and is inequitable to all of its policy-holders, and that said defendants in error never having paid or offered to pay any of said defaulted premiums, should be estopped from recovery in this action.

Your petitioner states that said cause No. 511 came on for trial to a jury in the Circuit Court of the United States for the District of Washington, Northern Division, on the 4th day of September, 1901, and upon said trial it was shown by uncontradicted evidence that the first annual premium was paid, and the said policy of insurance was delivered to said George Dana Hill at the city of Seattle, in the State of Washington. It was also admitted that no other premium had ever been paid or offered to be paid during the life time of said Hill; that his death occurred December 4th, 1890; that from the date of the application for said policy until the time of his death, the residence, place of business and post office address of said George Dana Hill was at Seattle, Washington, and that he had no post office address in the State of New York. It was also shown by uncontradicted evidence that at the time the second annual premium on said policy became due as alleged in the answer, the usual renewal receipt of the company, signed by its president or secretary, was placed in the hands of the local agent of the company at Seattle, who presented it personally to the insured, George Dana Hill, and advised him of the due date and amount of the premium, and called upon him for payment, and that repeated requests for the premium were made, extending over a period of a month or more, but that through lack of ability, or disinclination, the said insured failed and refused to make payment, and that after such ineffectual attempts to collect the premium, the renewal receipt was

returned to the home office and the policy entered as lapsed, forfeited and terminated upon the books of the company. It was also shown that the insured, Hill, was an educated man, having served a number of successive terms as treasurer of the county in which the city of Seattle is situated. It was admitted the wife had died prior to the death of the insured, and that the plaintiffs below were, up to the date of his death, minors of tender age, residing with the said George Dana Hill at his home in Seattle, and under his parental care and authority. Upon this undisputed testimony and the pleadings in the case, your petitioner, upon the close of the testimony, moved the Court to instruct a verdict in its favor, which motion was denied, and the said cause was submitted to the jury, with the following instructions:

"The Court—Gentlemen of the Jury: This is an action brought by the plaintiffs, who are the children and heirs of George Dana Hill, to recover the amount of insurance upon the life of George Dana Hill, written by the defendant company in the policy described in their complaint.

"It is conceded that the defendant's company issued the policy and received payment of the first annual premium. The issuing and delivering of the policy and the receipt of the premium put the contract in force so that it became a binding obligation upon the defendant company. By the terms of the policy the company insured the life of George Dana Hill for the period of one year, for the amount of money which it received, and it also insured his life and became liable to pay to his wife, if living, or otherwise to his children, if she did not survive him, the amount of the insurance at the time of his death, upon the condition that the annual premiums should be kept paid. There was as much obligation on the part of

the beneficiaries in this policy to pay the insurance company the annual premiums provided for, as there was upon the part of the defendant company to pay the insurance at Captain Hill's death.

"It is also a conceded fact in the case that no other premium was ever paid to the company except the first one, and that there was a default made in the payment of premiums, which accrued on the 29th day of April, 1887, and on the same date in 1888, and the same date in 1889, and the same date in 1890.

"Ordinarily, where parties are free to make their own contracts according to the disposition of their own minds, a contract, conditional, as this one is, would be terminated as to the rights of the defaulting party and as to the obligation of the adverse party, by a breach of the conditions of the contract as there has been in this case, but there is a question in this case as to whether the rights of these plaintiffs are not saved by a provision in the statutes of New York which was in force during the time intervening between the issuance of the policy and the death of Captain Hill, which denied to the insurance company the right to claim a forfeiture for non-payment of premiums or to claim that the policy had lapsed because of the non-payment of premiums, unless the company proceeded in a manner provided specially by the statute for giving notice containing specific declarations provided in the statute, which notice had to be sent to the person whose life was insured, by mail, at least thirty days before a forfeiture could be claimed. Now, that question, whether the rights of the parties are saved or not by this statute is a question which the Court reserves for future consideration. It is a fact that one of the contracting parties resided in the State of Washington and that the home office of this defendant company is in New York, and that the transactions between them by which a contract was finally consummated, was partly in the State of Washing-

ton and partly in the State of New York, and because of the transactions being thus partly in one State and partly in another, there is a question in the case whether the law of New York, by reason of its own force, did have any controlling effect in the case; and the parties have, in the contract itself, made certain stipulations which leave a question which has not yet been passed upon by the Supreme Court of the United States in this case, or any other case, and that question as to the effectof the stipulation of the parties in this contract, is one which the Court reserves for future consideration.

"Now, the Court assumes, in submitting the case to you, that the rights of the plaintiffs are saved by the New York statute, unless the contract has been abrogated by the conduct of the plaintiffs since the policy was issued.

"One of the defenses set up in the defendant's answer is, that these plaintiffs neglected and refused to pay the premiums. A refusal on their part would constitute a complete bar of their right to recover in this case. If they have refused to pay the premium then that amounts to a complete abrogation of the contract itself.

"Now, a refusal implies an affirmative act with knowledge and with an opportunity to act. It is not synonymous with omission. A mere omission to pay the premium has no such effect, but the defense that is interposed here is that these plaintiffs with knowledge that the premiums were due and were unpaid, refused to pay them, and that is the question which I submit for you to decide, whether the evidence proves that there was any such affirmative act on the part of the plaintiffs in this case, as would amount to a refusal to pay the premiums or whether there was any express contract or agreement since the delivery of the policy, which amounts to an agreement on their part to surrender the policy or abrogate the contract.

"There is another question which I submit to the jury, and that is whether Captain Hill himself, whose life

was insured, abrogated this contract by any agreement on his part to surrender or avoid it. He was not the agent or trustee of the plaintiffs, and his act would not be an equivalent to their act, but the contract was made by him; and his failure to pay the premium, if it was known to the plaintiffs and was acquiesced in by them and ratified by them, would be an abrogation of the contract. His act, not especially authorized or ratified, would not have that effect.

"If you find from the evidence that there was any affirmative act on the part of these plaintiffs or any act of their father that was approved and ratified by them, which abrogated this contract in any way, your verdict will be for the defendant. If there was no such subsequent abrogation of the contract your verdict will be for the plaintiff and you will return a verdict in favor of the plaintiffs in the sum of $29,020.

"I submit to you two forms of verdict. Whichever conforms to your decision in the case will be signed by your foreman and brought into court as your verdict in the case."

Thereupon the jury rendered a verdict against your petitioner in the sum of twenty-nine thousand and twenty dollars.

Your petitioner further states that it requested certain instructions to be given to the jury which it believes were erroneously refused; that in due time and manner your petitioner moved the said trial court to set aside said verdict and for a new trial, which motion your petitioner believes was erroneously denied; and your petitioner further in the reservation of its rights, moved that notwithstanding said verdict, judgment should be rendered in favor of your petitioner, which motion was also by the said trial court denied, to which second ruling your peti-

tioner duly excepted and its exception was allowed by the court, and thereafter and on the 30th day of January, 1902, the following judgment was rendered upon said verdict:

"IN THE CIRCUIT COURT OF THE UNITED STATES, DISTRICT OF WASHINGTON, NORTHERN DIVISION.

ELIZA MAUD HILL, GEORGE E. HILL, ELLEN KELLOGG HILL, and EUGENE HILL by his guardian, EBEN SMITH, *Plaintiffs,* vs. THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, *Defendant.*	No. 511

JUDGMENT.

The above cause having heretofore come on for trial in the above court on the 4th day of September, 1901, and the jury having been regularly empaneled, and the Court having heard the proofs and the allegations of the parties and Stanton Warburton, Harold Preston and Eben Smith having appeared for the plaintiffs, and Messrs. Struve, Allen, Hughes & McMicken, and R. C. Strudwick, having appeared for the defendant, and the case having been submitted to the jury upon the instructions of the Court and the allegations of the parties, and the jury having retired to consider the evidence under the instructions of the Court, and having returned a verdict in open court in favor of the plaintiffs and against the defendant on the 6th day of September, 1901, in the sum of $29,020, and the defendant having filed and served its motion for a new trial and the same having been argued and considered by the court and overruled, and exception to the ruling of

the Court duly allowed, and the motion of said defendant for judgment notwithstanding the said verdict having been argued by counsel of the respective parties, and having been duly considered, was overruled, and exception was duly allowed; now upon the application of the plaintiffs for judgment upon said verdict:

It is ordered, considered, and adjudged that the plaintiffs, Eliza Maud Hill, George E. Hill, Ellen Kellogg Hill and Eugene Hill, do have and recover of and from the defendant, The Mutual Life Insurance Company of New York, the sum of $29,020.00, together with the sum of $677.13 interest from the 6th day of September, 1901, together with their costs and disbursements in this action taxed at $....., said sum to draw interest from this date at the rate of six per cent per annum. To the rendering of the foregoing judgment said defendant excepts and its exception is allowed.

January 30, 1902.

C. H. HANFORD, Judge."

(Endorsed): Judgment. Filed in the United States Circuit Court, District of Washington, January 30, 1902. A. Reeves Ayres, Clerk.

H. M. Walthew, Deputy."

V.

Your petitioner, feeling itself aggrieved by the said judgment, within six months after its rendition, sued out a writ of error in the Circuit Court of Appeals for the Ninth Circuit for the State of Washington, of the manifest errors that happened to the damage of your petitioner as shown by the records and proceedings as well as the judgment, and the returned writ of error having been made to the said Circuit Court of Appeals, and each and all of said errors were by proper assignments of error duly presented

for the determination of said appellate court and the cause came on for hearing before said Court and on the 6th day of October, 1902, the said Circuit Court of Appeals rendered and filed its opinion in writing affirming the judgment of the said Circuit Court.

VI.

Your petitioner further states that conformably to the rules of said Circuit Court of Appeals, your petitioner duly filed and presented to said Circuit Court of Appeals its petition for rehearing of the said cause in said Court, which petition was by said Circuit Court of Appeals on the 10th day of November, 1902, denied, and pursuant to the said written opinion said Circuit Court of Appeals has made and entered its judgment affirming the judgment of the said Circuit Court.

VII.

Your petitioner states that on the face of the record of said cause as the same is on file and was presented in said Circuit Court of Appeals with the assignment of errors made and presented by your petitioner in the said Circuit Court of Appeals, substantially the same issues and questions are presented in this case as were presented in the case of

Mutual Life Insurance Co. v. Phinney (178 U. S. 327).

Mutual Life Insurance Co. v. Sears (178 U. S. 345).

Mutual Life Insurance Co. v. Hill (178 U. S. 347).

Mutual Life Insurance Co. v. Allen (178 U. S. 351).

Mutual Life Insurance Co. v. Cohen (179 U. S. 362).

and that in the judgment of counsel of your petitioner, the rules and views as expressed in said opinions, if adopt-

ed and followed by the said Circuit Court of Appeals in determination of your petitioner's said cause, would have resulted in the reversal of the same by said Circuit Court of Appeals, but that on the contrary, in the judgment of counsel of your petitioner, the spirit and meaning in effect of the said opinions of this Court were not correctly apprehended by said Circuit Court of Appeals, and the same were erroneously interpreted, and were either not applied, or were erroneously applied to the facts in your petitioner's case in the said Circuit Court of Appeals, so that in the opinion of counsel of your petitioner, your petitioner was deprived of the benefit of the rules and views expressed in said opinions of this Court, to your petitioner's great prejudice.

The following questions and propositions were and are in issue in the adjudication of said cause:

First: Whether the statutes of New York, of 1876, as amended in 1877, relating to Insurance Companies transacting business in the State of New York, apply to the policy of insurance in this case, which was delivered and first came into being in the territory of Washington, where at the time of delivery the first premium was paid.

Second: Whether, if the said policy having been delivered and becoming binding in the territory now State of Washington as a contract was in its performance to controlled by the statutes of the State of New York.

Third: Whether, the first premium having been paid, and the policy having been delivered in the State of Washington, and the insured having at that time and until his death, his residence and post office address in the State of Washington, and having no post office address in the State

of New York, the statutes of New York could have any application to the contract of insurance.

Fourth: Whether the following provision in the application for insurance,

"And it is agreed there shall be no contract of insurance until the policy shall have been issued and delivered by said Company, and the first premium thereon paid, while the person proposed for insurance is in the same condition of health described in this application; and if said policy be issued, the declarations, agreements and warranties herein contained shall be a part thereof; and the contract of insurance when made shall be held and construed at all times and places to have been made in the city of New York,"

when considered along with other parts of the application and policy, and especially the following printed upon said application, "SPECIAL NOTICE TO APPLICANTS AND POLICY HOLDERS. * * *

"Policy holders must not expect to be notified when their premiums will be due. It is a practice of the Company to send these notices as reminders, when the address is known, but no responsibility is assumed on the part of the Company in consequence of their non-reception,"

and the following provision in the policy,

"Each premium is due and payable at the home office of the Company in the city of New York; but will be accepted elsewhere when duly made in exchange for the Company's receipt signed by the President or Secretary. Notice that each and every such payment is due at the date named in the policy, is given and accepted by the delivery and acceptance of this policy, and any further notice required by any statute is thereby expressly waived."

subjects your petitioner to compliance with the statute of New York relative to mailing premium notices, notwithstanding the fact that said policy was delivered when the first annual premium was paid in the territory of Washington, and notwithstanding the fact that the post office address of said insured was at all times during his life in the State of Washington, and that during all such times he had no post office address in the State of New York.

Fifth: Whether your petitioner, being a Mutual Life Association, whose membership is composed of its premium paying policy holders, can be compelled to pay the death loss, although but a single annual premium had been paid on the policy upon its delivery in the territory of Washington, April 29, 1886, and no payment or offer of payment of the premiums falling due in April, 1887, 1888, 1889 and 1890 was made by or on behalf of the insured in his life time, or offered to be made by or on behalf of any of his beneficiaries before the commencement of or during the pendency of the action.

Sixth: Whether upon the facts stated in the last proposition, the action is not in the nature of specific performance, and whether plaintiffs bringing this suit are not estopped by reason of failure of performance of the contract upon their part and that of the insured from seeking a recovery from the members of the Association who have by the payment of premiums created a fund out of which plaintiffs in the trial court are seeking contribution in the payment of the death loss provided for in this policy.

Seventh: Whether, by reason of the admission that before a single annual premium had been paid upon the

policy, and the undisputed testimony that at the time the second annual premium fell due, the local agent of the Company, having repeatedly presented the renewal receipt to the insured, George Dana Hill, Seattle, Washington, and requested payment, and the said Hill having been informed of the amount of the premium and offered in exchange for its payment such renewal receipt, but failing and declining to make payment of the same, had not abandoned and terminated the policy; and further, whether the Company was not thereby warranted to treat the policy as terminated, and so enter it as it did upon its books, and whether if the policy was by the mutual action of the insured and the Company, terminated and abandoned, the beneficiaries are not bound by such arrangement.

Eighth: Whether the refusal of the insured, George Dana Hill, to make payment of the second annual premium, as is shown by the undisputed testimony, and continuing in such refusal until his death in December, 1894, is not the refusal of the beneficiaries.

Ninth: Whether the Insurance Company was required to make demand of payment from the beneficiaries, who from the date of the insurance until the death of George Dana Hill, were his infant children of tender age, left in his home at Seattle, under his parental care and keeping.

Tenth: Whether, for the purposes connected with the payment of premiums, the insured, George Dana Hill, was not the trustee or agent of the beneficiaries in all matters relating to the payment of premiums, and whether they were not bound by his acts and conduct in relation thereto.

Eleventh: Whether the laws of the state of New York enter into this contract of insurance or control in its performance or in the business of collecting premiums on the policy in the face of the specific stipulation of the parties in the policy that no notice other than the policy itself provides, shall be given, any statute to the contrary notwithstanding.

VIII.

Your petitioner further states that it has issued and now outstanding in the different territories and states of the Union, and elsewhere, many thousands of life insurance policies, has entered into such contracts with large numbers of the residents and citizens of the State of Washington, and throughout the Ninth Judicial Circuit, and other life insurance corporations created and organized under the laws of the State of New York, have entered into and now have outstanding large numbers of similar policies in said states and territories; that in view of the large amount of money involved in this litigation, and in view of the difference of judicial opinions respecting a number of the questions involved in this case, as your petitioner is informed and believes, between this honorable Court and the Circuit Court of Appeals for the Ninth Judicial Circuit, and the Circuit Courts in said judicial circuit, your petitioner represents that the gravity of the matters involved in this case is such that they should be authoritatively and finally adjudicated by this honorable Court upon a full and fair presentation of the merits of the said case (or such of them as the Court may direct) on the part of your petitioner, and the said defendants in error,

Eliza Maud Hill, George E. Hill, Ellen Kellogg Hill and Eugene C. Hill, by his Guardian ad litem, Eben Smith.

X.

Your petitoner states that a certified copy of the entire record in this case in the said Circuit Court of Appeals is herewith furnished and hereto annexed as a part of this application in conformity to Rule 37 of this honorable Court, relating to cases from the Circuit Courts of Appeals, and the same is marked "Exhibit A."

WHEREFORE, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this honorable Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding the said Court to certify and send to this Court on a day certain to be therein designated, a full and complete transcript of the records and all proceedings in the said Circuit Court of Appeals in said cause therein entitled "The Mutual Life Insurance Company of New York, Plaintiff in Error, vs. Eliza Maud Hill, George E. Hill, Ellen Kellogg Hill and Eugene C. Hill, by his Guardian ad Litem, Eben Smith, Defendants in Error, No. 813, to the end that the said cause may be reviewed and determined by this court as provided by Section six of an act of Congress entitled "An Act to establish Circuit Courts of Appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891, or that your petitioner may have such other or further relief or remedy in the premises as to this Court may seem appropriate and

in conformity to said act, and that the said judgment of the said Circuit Court of Appeals in said case, and every part thereof, may be reversed by this Honorable Court.

And your petitioner will ever pray, etc.,

JULIEN T. DAVIES,
EDWARD LYMAN SHORT,
JOHN B. ALLEN,
E. S. PILLSBURY,
W. H. CHICKERING,
Attorneys and Counsel for Petitioner.

DISTRICT OF WASHINGTON,
Northern Division,
County of King.

JOHN B. ALLEN, being duly sworn, says: That he is one of the attorneys and of counsel for The Mutual Life Insurance Company of New York, petitioner above named, and as such has had personal charge for it of the case in the foregoing petition mentioned in the Circuit Court of Appeals for the Ninth Circuit; that he has read the said petition by him subscribed, and that the facts therein stated are true to the best of his information and belief.

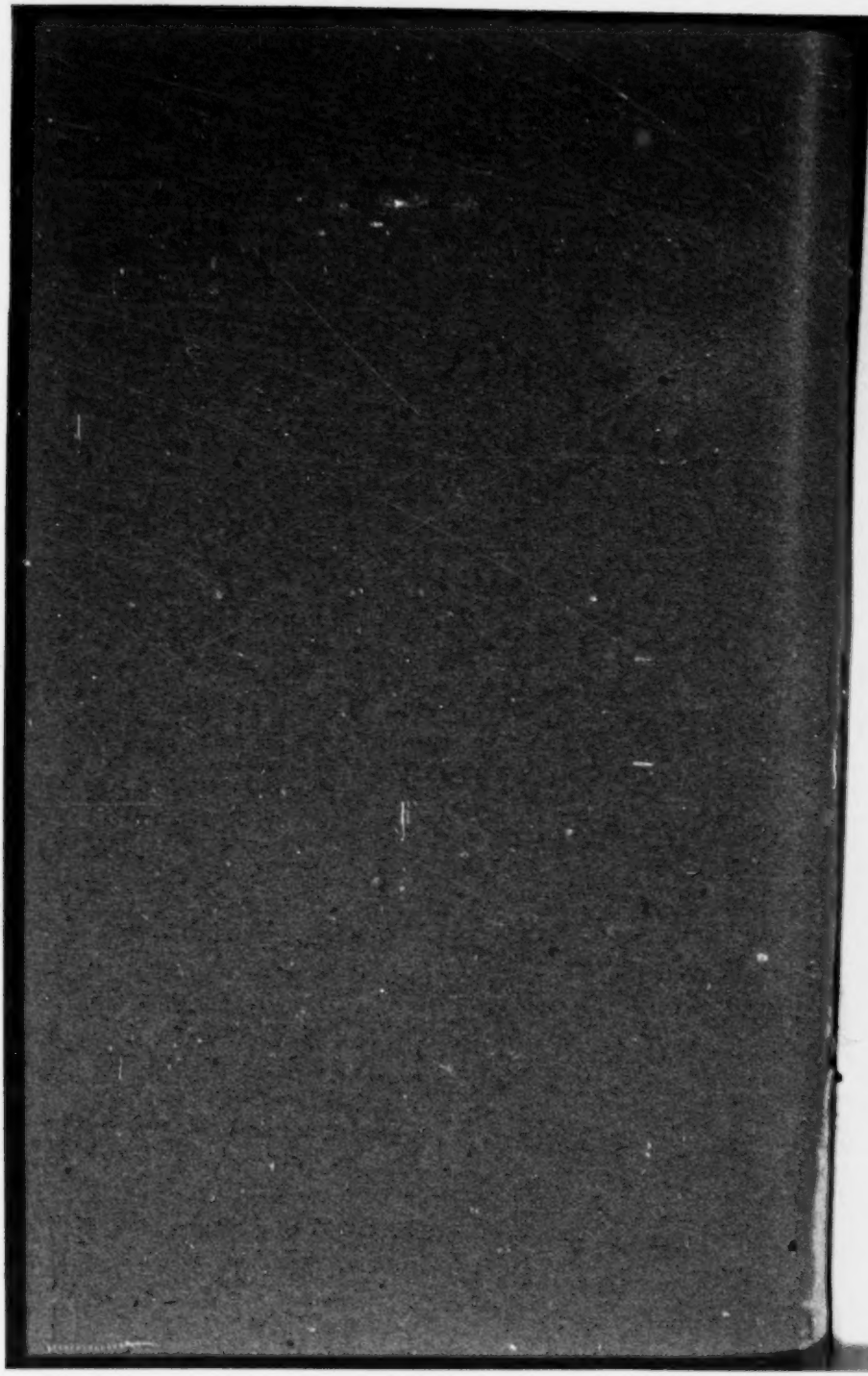
JOHN B. ALLEN.

Subscribed and sworn to before me this fifth day of December, A. D. 1902.

A. REEVES AYRES,
Clerk of the United States Circuit Court for the District of Washington, Northern Division.

By R. M. HOPKINS,
Deputy Clerk.

[Seal.]



13507

Supreme Court of the United States

OCTOBER TERM, 1902.

No. 518.

MUTUAL LIFE INSURANCE COMPANY, PLAINTIFF IN ERROR AND PETITIONER,

vs.

ELIZA MAUD HILL ET ALS.

PRELIMINARY STATEMENT.

This court has once before in this same case reviewed and reversed the wrongful judgment of the circuit court of appeals for the ninth circuit.

Mutual Life Ins. Co. *vs.* Hill, 178 U. S., 347.

As now made up, the record involves in another aspect the erroneous application by the courts of the ninth circuit of the premium-notice laws of the State of New York to insurance business transacted outside of the State of New York, and the error now complained of is allied with and

is quite equal in public importance to the errors which engaged the attention of this court in the cases of—

Mutual Life Ins. Co. *vs.* Phinney, 178 U. S., 327.
Same *vs.* Sears, 178 U. S., 345;
Same *vs.* Hill, 178 U. S., 347;
Same *vs.* Allen, 178 U. S., 351;
Same *vs.* Cohen, 179 U. S., 362;

all of which were brought within the appellate jurisdiction of this court by the writ of certiorari.

As appears from the record in the cause and from the opinion of this court heretofore delivered therein, *ubi supra*, the policy of insurance sued on was delivered to Hill, the insured, at Seattle, Washington, where he resided and where the first and only premium paid was paid by him on or about April 29, 1886. The policy was payable "unto Ellen Kellogg Hill, wife of George Dana Hill, * * * for her sole use, if living, * * * and if not living, to such of the children of their bodies as shall be living at the death of said wife, or their guardian for their use."

George Dana Hill, the insured, continued to reside at Seattle until December 4, 1890, when he there died, no premiums except the first having been paid upon said policy.

The primary beneficiary, Ellen Kellogg Hill, died during her husband's lifetime, on February 14, 1887.

Of the secondary beneficiaries, the children of the insured, four survived their father, all being minors at the time of his death.

No premiums on said policy were ever tendered by said beneficiaries nor by any one on their behalf, and this suit was not instituted by or for them until October 19, 1895,

about five years after the death of the insured and more than eight years after the payment of any premium on the policy.

The circuit court and circuit court of appeals of the ninth circuit, disregarding the plain principles of law declared by this court in the group of cases above cited, gave judgmen against the insurance company and in favor of the beneficiaries named therein for the sum of $29,020.

The judgment of the circuit court of appeals in the cause is final, and unless this honorable court shall again intervene in the proceedings by issuing the writ of certiorari, your petitioner, under the guise of law, but most wrongfully and unjustly, will be compelled to pay over the large sum of money above set forth.

The details of the cause and the precise errors committed by the lower courts are recited more at length hereinafter.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1902

Ex Parte THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a corporation, Petitioner.

Petition for Writ of Certiorari requiring the Circuit Court of Appeals for the Ninth Circuit to certify to the Supreme Court for its review and determination, the case of THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Plaintiff in Error, vs. ELIZA MAUD HILL, GEORGE E. HILL, ELLEN KELLOGG HILL and EUGENE C. HILL by his Guardian EBEN SMITH, Defendants in Error.

BRIEF OF PETITIONER

STATEMENT.

The Mutual Life Insurance Company of New York, a corporation chartered as such by a special act of the Legislature of the State of New York, in April, 1886, insured the life of George Dana Hill by a policy in the sum of Twenty Thousand Dollars, on the ordinary life plan,

payment of the death loss to be made to his wife, if living at the time of the death of the insured, and if not, to such of the children of their bodies as should be living at the time of the wife's death. (Petition, p. 5-6.) At the time of taking the insurance, Hill was a resident of the city of Seattle, and a citizen of the then territory (now state) of Washington. The Insurance Company complied with the laws of the then territory, now state, of Washington, requiring a foreign corporation transacting business therein, to file with the Secretary of State a copy of its Articles, and to appoint an agent in its particular place of business in the territory. The statutory agent was also the general agent of the Insurance Company in the state and territory representing it in the conduct of business therein. (Record, p. 94-93.)

The Insurance Company also had a general office at San Francisco for the conduct and management of its business affairs on the Pacific Slope. The application for insurance and the physical examination of the applicant, were made at Seattle. The application was delivered to the agent of the Company at Seattle, and by him transmitted to the general agent at San Francisco, who transmitted it to the Home Office in New York, and in due course of time the policy of insurance was issued and transmitted by mail through the office at San Francisco, to the agent at Seattle, where, upon payment of the first annual premium of $814.00, the policy was delivered to George Dana Hill. (Petition, p. 5-6. Record, p. 109-110.)

Prior to, at the time of, and subsequent to the 29th of April, 1886, there was in force and effect in the territory of Washington, a statute as follows:

"Section 2478. All corporations now existing, or hereafter formed under the laws of other states or terri-

tories of the United States for the conducting and transacting of marine, life and fire insurance, or any other business not inconsistent with the organic law of this territory, shall have full power and authority to sue and be sued, hold, purchase and acquire, sell and dispose of real and personal property, and generally to do and perform any and every act, and transact business within this territory, in the same manner and to the same extent as though such corporation had been organized under the laws of this territory." (Petition, p. 3.)

The application for insurance, and endorsements upon the policy, were made parts of the contract. In the application there was a stipulation and condition to the following effect:

"And it is agreed there shall be no contract of insurance until a policy shall have been issued and delivered by said Company, and the first premium thereon paid, while the person proposed for insurance is in the same condition of health described in this application; and if said policy be issued, the declarations, agreements and warranties herein contained, shall be made a part thereof; and the contract of insurance when made shall be held and construed at all times and places to have been made in the city of New York." (Petition, p. 5. Record, p. 73-74.)

Under the title "Special Notice to Applicants and Policy-Holders" printed upon the application, is the following:

"Fourth. Policy holders must not expect to be notified when their premiums will be due. It is a practice of the Company to send these notices, as reminders, when the address is known, but no responsibility is assumed on the part of the company, in consequence of their non-reception." (Record, p. 75.)

Among the endorsements on the policy is the following:

"Each premium is due and payable at the Home Office of the Company in the city of New York; but will be accepted elsewhere when duly made in exchange for the Company's receipt signed by the President or Secretary. Notice that each and every such payment is due at the date named in the policy, is given and accepted by the delivery and acceptance of this policy, and any further notice required by any statute, is thereby expressly waived." (Petition, p. 7-8.)

George Dana Hill continued to reside at Seattle, Washington, from the date of his application in April, 1886, until his death, December 4, 1890. (Petition, p. 4.) No premium was ever paid subsequent to that paid upon the delivery of the policy in 1886. The renewal receipt signed by the Secretary of the Company for the second year's premium was transmitted to the agent at Seattle, who carried it to the insured, George Dana Hill, and personally notified him of the time the second annual premium fell due, demanded payment of the same, and offered the renewal receipt in exchange for payment of the premium. Hill expressed himself to the agent as being unable to make payment, and after repeated efforts to collect the premium, the agent returned the renewal receipt to the San Francisco office. The receipt was again sent back from the San Francisco office to the agent at Seattle, to make further request and to offer Hill further opportunity of making payment. The receipt was again presented to Hill, with request of payment, which he failed and refused to make, whereupon the receipt was sent back to the San Francisco office, and from there to the Home Office, and the policy was thereupon entered upon the books of the Company as lapsed and terminated, and thus

the matter remained during the life time of the insured. (Petition. p. 8. Record, 113-115-116-117.)

After the death of George Dana Hill, this action for the recovery of the amount of the policy, was begun in 1895, in the Circuit Court for the District of Washington, Northern Division. The amended complaint pleaded certain provisions of the application and set forth the policy and endorsements upon it, which were made part of the contract of insurance. Performance by the insured of the conditions of the contract was averred in the complaint, but controverted by the Company. The statute of New York of 1876 provides:

"No Life Insurance Company doing business in the state of New York shall have power to declare forfeited or lapsed any policy hereafter issued or renewed, by reason of non-payment of any annual premium or interest, or any portion thereof, except as hereinafter provided. Whenever any premium or interest due upon any such policy shall remain unpaid when due, a written or printed notice stating the amount of such premium or interest due on such policy, the place where said premium or interest shall be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is assured, or the assignee of the policy, if notice of the assignment has been given to the Company, at his or her last known post office address, postage paid by the Company or by an agent of such Company or person appointed by it to collect such premium." (Petition, page 2.)

The amendment of 1877 to this Act has the following provision:

"The affidavit of any one authorized by Section one to mail such notice, that the same was duly addressed to the person whose life is assured by the policy, or to the assignee of the policy, if notice of the assignment has

been given to the Company, in pursuance of said section, shall be presumptive evidence of such notice having been given." (Petition, p. 3.)

The Mutual Life Insurance Company, as a first defense, affirmatively alleged that from the date of the application until his death, George Dana Hill was a citizen and resident of Seattle, Washington, and there made to the agent of the Mutual Life Insurance Company his written application for insurance; that his medical examination was had at Seattle; that the application was forwarded from Seattle by the local agent to the general San Francisco agency, and from there to the Home Office; that upon the issuance of the policy, it was transmitted to the San Francisco office, and thence to Seattle, where, upon the payment of the first annual premium to the local agent, the policy was delivered to the insured. The provision in the application that there should be no contract of insurance until the policy had been delivered by the Company on the first premium paid, while the person proposed for insurance was in the same condition of health described in his aplication, was pleaded, and also the failure, neglect and refusal of the assured or any of the defendants in error, to pay the annual premium of $814.00 due April 29, 1887. (Record, p. 18. Petition, p. 10.)

A second defense was that said Hill defaulted in making payment of the second annual premium of $814.00 falling due April 29, on account of which the Company had entered the policy upon its books as lapsed and terminated; that neither Hill during his lifetime, nor any one in his behalf, sought to have the policy restored, or made tender of any default of the premiums, but acquiesced in the course of the Company in terminating the policy for

non-payment of premium, and the mutual abandonment of the policy.

As a third affirmative defense, the failure, neglect and refusal on the part of the insured, George Dana Hill, and each of the beneficiaries, to pay the annual premium of $814.00 falling due April 29, 1887, were alleged, and that no other than the first annual premium had ever been paid, or offered to be paid, either by the insured or any of the beneficiaries; that the Mutual Life Insurance Company was a mutual life association chartered under the laws of the state of New York; that at the time of the delivery of the policy, and subsequent thereto, it had large numbers of outstanding policies, and its membership consisted of many thousands of persons whose lives were insured by the Company in various sums, and that during such times, the Association was dependent upon the proceeds of the funds arising from the payment of the premiums of its policy holders, to meet its death losses, and in order to meet its liabilities and discharge its duties to its members, it was necessary that every member of the Association make payment of his premiums, and also make such payment as the same respectively became due; that but a single annual premium had been paid upon this policy; that neither, on the part of Hill during his life time, had there been any offer to pay any part of the premiums for the years 1887, 1888, 1889 or 1890, nor upon the part of any of the beneficiaries to make payment before the commencement of or during the pendency of the action. (Petition, p. 10-11. Record, p. 25.) That by reason of the premises, plaintiffs in the trial court were estopped from claiming the policy to be an existing contract, or from claiming any right of recovery thereon.

As another affirmative defense, it was alleged that

by the conduct of Hill in declining to make payment of the second annual premium, as he was repeatedly urged to do when the renewal receipt was presented to him, the Company was induced to believe, and did believe, that the contract of insurance was abandoned, and continued to act upon that condition of things, and was induced thereby to abstain from giving any notice under any statute, by mail, or otherwise, for the purpose of terminating the policy. (Record, 29. Petition, 11.)

It was also affirmatively pleaded that the Mutual Life Insurance Company was a mutual life association, as before stated; that on the 31st day of December in every year, it ascertained the amount of its liabilities, which depended upon the policies issued by it, remaining in force; that it made ascertainment of liabilities and gave statements to its policy holders for their information and protection; that its liabilities depend upon its policies upon which premiums are paid that by reason of the failure and declination of Hill to pay the premium of $814.00, falling due April 29, 1887, petitioner caused his policy to be entered upon its record as lapsed and terminated, and the same was not included as a liability is its ascertainment and statement to its policy-holders—that it had induced its premium paying policy holders to rely upon such statements and reports, and that the Hill policy did not constitute a liability; that the first annual premium paid in April, 1886, upon the policy was chiefly absorbed and expended in the payment of fees and commissions of agents and examiners, and office expenses relating to the obtaining and issuing of the policy; that the said premium of $814.00 purchased only one year's insurance, and that there never was in fact or in equity any balance or credit by way of surplus, accretion or reserve owing upon

the policy, and that to allow a recovery upon this policy tended to the disorganization and destruction of petitioner's insurance business, and on account thereof, the plaintiffs below should be estopped from recovery. (Record, 31-32. Petition, 13.)

A jury trial was had, resulting in a verdict of $29,020 (Record, 48) against your petitioner, upon which judgment was rendered (Record, 63), which was affirmed on error to the Circuit Court of Appeals (Record, 207), and plaintiffs' petition for re-hearing denied. On the trial it was shown by uncontradicted evidence that the application was made, the medical examination had, the first annual premium paid, and the insurance policy delivered to George Dana Hill at Seattle, Washington. It was admitted that no other premium had ever been paid, or offered to be paid, except the first (Petition, 16); that Hill's death occurred December 4th, 1890; that from the date of the application until his death, his residence, pla e of business and post office address, were at Seattle, Washington, and that said George Dana Hill had no post office address in the state of New York. (Record, 69-71-72.) See admitted allegation (Paragraph 5, Record, p. 28). It was also shown by uncontradicted evidence that at the time the second annual premium became due, the renewal receipt of the Company was placed in the hands of its local agent at Seattle, who presented it personally to George Dana Hill, and advised him of the due date, and amoust of premium, and called upon him for payment. Repeated requests for premium were made, extending over a period of a month or more, but through lack of ability or disinclination, the insured failed, declined and refused to make payment, and that after such ineffectual attempts to collect the premium, the renewal

receipt was sent to the Home Office, and the policy entered as lapsed upon the books of the Company. (Petition, p. 14-15. Record, 68-9.) It was admitted the wife died before the insured, and it was shown by undisputed testimony that the children of the deceased wife and the insured, who were all minors residing with the insured, George Dana Hill, in his home at Seattle, and under his parental care and authority, to the date of his death. (Petition 15, Record 84.)

The third and last affirmative defenses were substantiated by introduction in evidence of your petitioner's charter. (Record, p. 93 to 101; also p. 141, and the testimony of Sherwood Gillespie.) Upon the close of the testimony, your petitioner requested the judge of the trial court, upon the whole case, to instruct a verdict in its favor. (Record 149-151.) Motion was refused, the judge saying:

"Mr. Allen, you may have your motion noted and state the grounds as fully as you wish to have your objections preserved in the record. I have thought about this case a good deal and I think it ought to be tried out fully at this time, and I will submit it to the jury for a verdict, After a verdict, either party may move against the verdict, move for a judgment or move for a new trial, or make both motions if you want to, and to make the record full for review in the Appellate Court, and I will hear your argument at that time, instead of taking up time to do it now. This case has been once through the course of a lawsuit up to the court of final resort, been through this Court and up to the Supreme Court of the United States and sent back here without having the law of the case settled. Now, a good deal of time has been consumed in this litigation to no purpose, and my object is to have your record made up so complete that if either party does take this case again up to the higher court, that it will be in

shape so that a final determination can then be made." (Record 150.)

Pursuant to the judge's request, the petitioner stated the grounds for its motion or request to direct a verdict (Record, p. 151-155), and briefly summarizes the same as follows:

First: Because the undisputed evidence is that the contract of insurance was actually delivered at Seattle, Washington, and the first annual premium there paid upon its delivery to the insured, and the contract thereby, under the ruling of the Supreme Court of the United States, was a Washington contract.

Second: Because the proof is undisputed that no other than the first annual premium was ever paid upon the policy.

Third: Because it was admitted in the pleadings and stipulated by the parties that the residence of the insured, George Dana Hill, from the time of the application in April, 1886, to his death, December 4, 1890, was at Seattle, Washington, and it was likewise proven and conceded that during all of said time, his post office address was at Seattle, Washington, and that he had during that time no post office address in the state of New York.

Fourth: Because in addition to the facts of the first premium being paid, and the policy delivered at Seattle, the application contains a notice and warning that notice of the due date of premiums is not to be given. The policy itself expressly provides that no other notice than that it contains shall be given of the due date of premiums, any statute to the contrary notwithstanding.

Fifth: Because the evidence is undisputed that at the time the second annual premium became due, the agent

of your petitioner, possessed of the renewal receipt, duly executed, applied to the insured, George Dana Hill, for the payment of the premium then due, in exchange for the receipt, at the city of Seattle, and that Hill failed and declined to make payment; that Hill failed and declined to make payment after being repeatedly called upon for payment by the agent tendering the renewal receipt.

Sixth: Because it is admitted in the pleadings that none of the plaintiffs in the trial court ever paid, or offered to pay, any premium prior to and during the pendency of the action.

Seventh: Because in the whole transaction of this insurance, so far as dealing with premiums is concerned, and meeting the conditions of the policy, George Dana Hill acted for all parties, and notice to him, and knowledge, failure and refusal on his part, was knowledge, failure and refusal on the part of the plaintiffs in the trial court, and what would bind or estop him, or terminate the contract as far as he is concerned, has the same effect with them.

Eighth: Because it is proven your petitioner was a Mutual Life Association, whose membership consisted of its premium paying policy holders, and that the burden of paying losses falls upon such policy performing members, and that in this case where four consecutive years passed without payment of any premium, and the action was commenced without payment or offer of payment of any premium, or in any way making good the liability for premiums, recovery cannot be had.

Ninth: Because if the notice statute of New York touches this contract of insurance, it does so solely by the convention of the parties, and not by operation of law, and the parties have expressly agreed that so far as

premium notices are concerned, such statute shall not apply to their contract. (Record 151-155.)

The Court refused to give the instructions of your petitioner to the jury, along the line of the foregoing contentions. (Record 156-163.) The trial judge, in submitting the case to the jury, assumed that the rights of the plaintiffs below were saved by the New York statute unless the contract had been abrogated by the conduct of the plaintiffs themselves after the policy was delivered. (Record 167.) The trial judge also instructed the jury that the insured, George Dana Hill, was not the agent or trustee of the beneficiaries, and had no power or authority by his refusal to pay the premium, or his abandonment or abrogation of the contract, to bind or affect the beneficiaries, and that unless the infant beneficiaries themselves abrogated the contract, or especially authorized the insured, George Dana Hill, to do so, no abrogation could take place. (Record 168.)

Your petitioner's motion for a new trial was denied (Record 51), and also its motion for judgment in its favor, notwithstanding the verdict and judgment rendered. (Record 63.)

ARGUMENT.

The issues here presented are substantially those considered by this Court in the cases of

Mutual Life Insurance Co. v. Phinney (178 United States 327).

Mutual Life Insurance Co. v. Sears (178 United States 345).

Mutual Life Insurance Co. v. Hill (178 United States 347).

Mutual Life Insurance Co. v. Allen (178 United States 351).

Mutual Life Insurance Co. v. Cohen (179 United States 362).

With deference to the Circuit Court of Appeals, it is the purpose of counsel of The Mutual Life Insurance Company, if able, to convince this Court that its opinions just mentioned were not, either in leter or spirit, correctly interpreted or applied by the subordinate court, and in consequence petitioner not only lost the benefit of those opinions, but had them turned against it.

Before entering upon the argument, we wish to state there were really no questions of fact left for the jury. By both parties the essential facts were conceded to be undisputed. Each requested the trial judge to direct a verdict. (Record 149-150.) The only questions submitted to the jury were: Did the plaintiffs below, the beneficiaries themselves, abrogate the contract of insurance, or did they especially authorize the insured, George Dana Hill, to do so? Or, did they with full knowledge of all the facts and circumstances of what he had done, ratify and adopt his action in declining and refusing to pay the second annual premium falling due in 1887? The oldest of these beneficiaries was at that time but fourteen years of age, and hence their legal incapacity; so that no issue of fact could be predicated upon their conduct in the premises We present the following reasons why a writ of certiorari should be granted under Sec. 6 of the Act of March 3, 1891 (26 Stats. at Large), requiring the record and cause to be sent up to this Court for its consideration.

I.

RECOVERY IN THIS CASE IS IN THE NATURE OF A SPECIFIC PERFORMANCE BY PARTIES WHO HAVE WHOLLY FAILED TO MEET THE OBLIGATIONS OF THE CONTRACT UPON THEIR OWN PART.

The policy of insurance is one entered into between George Dana Hill and the Mutual Life Insurance Company of New York, a mutual life association. The policy bears date April 29, 1886. The insured, George Dana Hill, died December 4, 1890. A single annual premium was paid upon the delivery of the policy, and nothing more. The action was commenced by the beneficiaries in the year 1895, without having tendered anything on account of delinquent premiums or made any offer of fulfilling the obligations of the contract on the part of the insured, before seeking recovery.

In instructing the jury, the judge said:

"It is also a conceded fact in the case that no other premium was ever paid to the company except the first one, and that there was a default made in the payment of premiums, which accrued on the 29th day of April, 1887, and on the same date in 1888, and the same date in 1889, and the same date in 1890." (Record 165-6.)

The allegations of the answer, that nothing had been paid or offered to be paid on account of the premiums, prior to the commencement of the action, are not controverted. (Record 35.)

In the case of Mutual Life Insurance Co. v. Phinney, 178 United States 327, near the close of the opinion, the Court says:

"A single further matter requires notice, and we mention it simply to indicate that we have considered, although we do not decide, the question involved therein: The contract of insurance is a peculiar contract, especially when made with a mutual insurance company, for although in terms a contract with a corporation, it is in substance a contract between the insured and all other members of that company. The character of this contract was fully considered and discussed by this court in New York Life Insurance Co. v. Statham, 93 U. S. 24, and to that case we refer without quotation. Now, whether the insurance company, if the law of New York be applicable, could insist upon a forfeiture without giving the notice prescribed by the Statutes of that state, and, enforcing it, forfeit all premiums paid, all obligation for the return of the surrender value, all right of the insured by subsequent payments to continue the policy in force, is one question. But it is a very different question whether the executrix of the insured, after his long delinquency in the payment of premiums, can enforce the contract as against the other insured parties, thereby diminishing their interest in the accumulated reserve. Ordinarily no one can enforce a contract unless on his part he performs the stipulated promise, and it may be that this rule is operative in this case. We do not care to decide the question, and only mention it for fear that it should be assumed we had overlooked it. It is a question which may never arise in the future litigation of this case, and until it necessarily arises we do not feel called upon to decide it."

Acting upon this significant suggestion, plaintiff in error, by an amended answer, presented this issue directly by way of two affirmative defenses, in which it pleaded it was such a mutual insurance association, whose membership consisted of its premium paying policy holders. It substantiated these defenses, in addition to the foregoing proofs, by the production in evidence of its charter, from which the following quotations are made:

"Section 7. Every person who shall become a member of this corporation, by effecting insurance therein, shall the first time he effects insurance, and before he receives his policy, pay the rates that shall be fixed upon and determined by the trustees, and no premium so paid shall ever be withdrawn from said company, except as hereinafter provided, but shall be liable to all the losses and expenses incurred by this company during the continuance of its charter." (Record 96.)

"Section 10. The whole of the premiums received for insurance by said corporation, except as provided for in the following sections, shall be invested in bonds and mortgages on unincumbered real estate within the State of New York, the real property to secure such investment of capital shall in every case be worth twice the amount loaned thereon." (Record 97.)

"Section 13. * * * Any member of the company who would be entitled to share in the profits, who shall have omitted to pay any premium, or any periodical payment due from him to the company, may be prohibited by the trustees from sharing in the profits of the company, and all such previous payments made by him shall go to the benefit of the company." (Record 98-99.)

And also by the testimony of its general agent at Seattle. (Record 139-142.) This defense was neither submitted to the jury, nor considered by the subordinate courts, although duly pressed upon the court's attention. (Record 154, Subdivision 8, 161.) By proper bill of exceptions and assignment of errors, the same question was presented to the Circuit Court of Appeals, and is now presented to this Court.

The beneficiaries in this policy stand before this Court conceding that but a single annual premium has been paid upon the policy; that for four consecutive years nothing was paid, when the insured died; that after a lapse of

nearly five additional years, without payment or tender of any of the contributions due on account of this policy, to the death-fund, they are asking the members of the society, who have created that fund, to pay the amount of the policy. Was the Statute of New York—if applicable—designed to effect such an end? It is a violation of the fundamental principles of both equity and justice. It is conceding non-performance upon their part, and at the same time demanding a reward for such non-performance, and exacting payment for their unfulfilled contract, from a fund created by the members of the association who have paid their premiums. It is in the nature of refusing to do equity, but insisting upon equity from others. The beneficiaries, under the policy, are the moving parties in this litigation, and are calling for full payment of their policy from a fund others have created, and to which they and their insured have refused to contribute. As stated in the Phinney opinion, it is not the question whether the insurance company—if the law of New York be applicable—can insist upon the forfeiture, without giving the prescribed notice, but it is *the very different* question propounded in that opinion, "whether the executrix of the insured, after his long delinquency in payment of premiums, can enforce the contract as against the other insured parties, thereby diminishing their interest in the accumulated fund."

In any other relation the parties would have no standign for the enforcement of their claim. Why should it be given them against a mutual life insurance company? This Court has likened this action to a suit for specific performance. If we follow the analogies of the law of specific performance, the plaintiffs would have no standing in Court, because there is a lack of mutuality which

is essential in such a suit. The insurance company could not have compelled payment of premiums as they fell due in the years 1887, 1888, 1889 and 1890, for the reason that there was no obligation on the part of any one to pay such premiums. In Marble Co. v. Ripley, 10 Wallace 359, it is said:

"Another reason why specific performance should not be decreed in this case is found in the want of mutuality. Such performance by Ripley could not be decreed or enforced at the suit of the marble company, for the contract expressly stipulates that he may relinquish the business and abandon the contract at any time on giving one year's notice. And it is a general principle that when, from personal incapacity, the nature of the contract, or any other cause, a contract is incapable of being enforced against one party, that party is equally incapable of enforcing it specifically against the other, though its execution in the latter way might in itself be free from the difficulty attending its execution in the former." (P. 359.)

Hill, though frequently requested, and though having the renewal receipt tendered him, had refused to pay the premium falling due in 1887, and had continued in that course until his death in 1890.

In Kelsey vs. Crowther, 162 United States, 404, it was said:

"The action was in the nature of a bill for specific performance of a contract for the sale and purchase of a tract of land. If the contract is construed as making it the duty of Crowther to tender the abstract, yet his failure to do so did not dispense with performance or the offer to perform on the part of the complainants. His failure to furnish the abstract might have justified the complainants in declaring themselves off from the contract, and might have formed a successful defense to an

action for damages brought by Crowther. But if they wished to specifically enforce the contract, it was necessary for the complainants themselves to tender performance."

In Walsh vs. Preston, 109 United States, the Court, at page 318, says:

"The failure on the part of the party applying for it to perform his own part of a contract wholly executory, or to show any sufficient reason for the failure, has always been held to be ground to refuse relief and turn the party over to his action at law."

In Hepburn vs. Auld, 1 Cranch., 330, Chief Justice Marshall, in delivering the opinion, says:

"To entitle themselves to the money for which this suit was instituted, it is incumbent on the plaintiffs to show that they have performed the very act on the performance of which the money became payable, or that they are excused by the conduct of the defendant for its non-performance."

In no event is relief in the nature of specific performance granted, except for the purpose of meting out equity and justice.

In McCabe vs. Matthews, 155 United States, 550, Justice Brewer states the rule as follows:

"A decree for the specific performance of a contract for the sale of real estate does not go as a matter of course, but is granted or withheld according as equity and justice seem to demand in view of all the circumstances of the case."

Pratt vs. Carroll, 8 Cranch, 471.
Holt vs. Rogers, 8 Peters, 420.
Willard vs. Taylor, 8 Wallace, 557.
Hennessey vs. Woolworth, 128 United States, 438.

II.

THE FIRST PREMIUM WAS PAID, AND THE POLICY DELIVERED AT SEATTLE, WHERE HILL RESIDED AND HAD HIS POST OFFICE ADDRESS FROM THE DATE OF THE APPLICATION UNTIL HIS DEATH.

The evidence was direct and unquestioned that the first premium was paid, and the policy delivered, at Seattle, in 1886. (Record 107-109.) It was stated in the application that Seattle was the residence and post office address of George Dana Hill. (Record 71.) It was also stipulated (Record 69), and alleged in the answer, and not denied, that Hill had no post office address in the state of New York. (Record 28, Paragraph V.) The policy in this, as in the Cohn case, contained a stipulation that it should not be binding until the first premium had been paid, and the policy delivered. In the Cohen case, 179 United States 264, the Court says:

"The premium was paid and the policy delivered in the state of Montana. Under those circumstances, under the general rule, the contract was a Montana contract, and governed by the laws of that state."

(It is claimed another clause in the application takes the contract out from this rule. This clause we will consider later in the brief.)

In the Cohen case the Court also says:

"It is worthy of notice that the State of New York has changed its legislation repeatedly in the last quarter of a century in respect to this very matter of notice."

And this fact strengthens the conclusion that it was not changing charters—"but prescribing only that which in

its judgment from time to time was the proper rule for business transacted within the state." (179 United States 266.)

In support of the same conclusion, attention was called by the Court to the thirty-day notice—that it might be reasonable within the state—but obviously in many cases outside the state, would be of little value. Attention was also directed to Section 2 of the Statute, providing that a certain affidavit should be presumptive evidence of giving notice, but which could not be operative in other courts than those of New York, and thereupon drew the following deduction:

"These considerations lead to the conclusion that the Statute of New York, directed as it is to companies doing business within the state, was intended to be, and is, in fact, applicable only to business transacted within that state."

In contemplation of this Statute thus interpreted, we respectfully insist, where the insured has no post office address in the state of New York, the statute does not apply, and was not intended to apply. The giving of notice to a post office address in Seattle, perhaps three thousand miles distant from that state, is not the transaction of corporate business in the state of New York, and for that reason the statute of New York has no application to the case. The provision in the Act of 1897, Chap. 218, Sec. 92, referred to in the Cohen case, that notice shall be addressed and mailed to the last known postoffice address of the insured, or his assignee, in the state of New York (see statutes in appesdix hereto), is simply a legislative declaration of the meaning of the statute from its enactment.

III.

THE CIRCUIT COURT OF APPEALS ERRONEOUSLY HELD THAT THIS COURT HAD IN ALL RESPECTS, EXCEPT UPON A SINGLE QUESTION, UPHELD ITS FORMER OPINION AND DECISION IN THIS CASE.

In its opinion (Record 201) the Circuit Court of Appeals says that "Upon the former hearing it was held by this Court that the policy of insurance in controversy was a New York contract, according to its terms, and that the laws of New York of 1877, Chap. 321, Sec. 1, providing that no insurance company shall declare a policy forfeited for non-payment of premiums, without having first given the assured thirty days' notice that the premiums were due, and that the policy would be forfeited if they were not paid, were mandatory; also that under such a policy the right of the beneficiaries could not be affected by an attempted waiver of the statute by the assured or by other than their own act and agreement. The judgment of this Court was reversed, upon the ground that the answer of the defendant, plaintiff in error, alleged that the insured and the company had agreed to abandon and determine the contract of insurance, and that the beneficiaries (plaintiffs below) had failed, neglected and refused to pay the second premium, thus refusing to continue the policy. This allegation of the answer, it was said, discloses a distinct agreement on the part of the insured and the company to waive and abandon the policy, and all rights and obligations on the part of the parties thereto. (Mutual Life Ins. Co. vs. Hill, 178 U. S. 347-350.)

"The case was sent back to the Circuit Court for trial on this question alone." * * * (Record 201-202.)

"The decision of the Court upon the other points not having been criticised or reversed by the Supreme Court, is now the law of the case for this Court."

Kankakee Coal Co. et al., Impleaded, vs. Crane Bros. Mfg. Co. 38 Ill. App. Ct. Rep. 555.
Matthews vs. Bank, 100 Fed. 397.
Texas & Pacific Ry. vs. Wilder, 101 Fed. 198 (Record 203).

This extremely artificial and, we think, erroneous interpretation of the opinions of this Court has not only debarred plaintiff in error of the advantages of the aid of those opinions, but has caused them to be turned against it. This Court, as already stated, has held the statute of New York was a mere regulating statute, and only applicable to business transacted in that state; that it did not operate *extra* territorially, and was subject at all times to legislative change or alteration, and that parties to policies were as free to deal with their contracts as they were with any other contracts not affected by this statute. We quote from the Mutual Life Ins. Co. vs. Sears, 178 United States 345, as follows:

"As we held in the prior case, there is nothing in the New York statute (if controlling at all)to prevent the parties from dealing with that as any other contract, and if they chose to abandon it, that action is conclusive."

The interpretation of this statute by the Circuit Court of Appeals is radically different. It regarded the statute as incorporated into all contracts of insurance, whether within or without the state of New York, and as dominating them throughout, and controlling and restraining the parties, so that they had not the power by any agreement or device to alter or terminate a policy after it had been

entered into, except by compliance with the provisions of the statute. In the case of the Mutual Life Ins. Co. vs. Hill, 97 Federal 263 (this case), the Circuit Court of Appeals expressed its views of the statute and a policy of insurance etnered into with a New York company, whether within or without that state, as follows:

"In Society v. Nixon, as in this case, it was contended that the statement made by the insured, when requested to pay the premium due upon the policy, that he did not intend to keep the policy in force, amounted in law to a waiver on the part of both the insured and the company of the notice required to be given by the statute of New York. Replying to this contention, the court said:

'That the statute of New York prescribes the condition upon which a policy may be forfeited for the nonpayment of a premium. The statute is mandatory, and controls the contract. Its provisions are not subject to be set aside or waived either by the company or the assured or by both together. Society v. Clements, 140 U. S. 226, 233, 11 Sup. Ct. 822; Hicks v. Insurance Co. 9 C. C. A. 215, 60 Fed. 690; Griffith v. Insurance Co. (Cal.) 36 Pac. 117, Warner v. Association, 100 Mich. 157, 58 N. W. 667.'

Entertaining no doubt of the correctness of the conclusions therein reached, we respectfully decline to further discuss the same identical questions. It is enough to say that we adhere to the views therein expressed." * * *

"The affirmative matters alleged in the answer constituted no defense to the cause of action alleged in the complaint. The contract of insurance became complete upon the payment of the first premium. It was kept alive by the provisions of the statute of New York, because the contingency of forfeiture, as therein provided for, had not happened. The contract is to be read in the light of the statute, the same as if the statute had literally been incorporated in the policy. It was not essential to

the right of recovery herein that the defendants in error should have paid, or tendered payment of, the premiums due on the policy before commencing the action. When Hill died the relation of debtor and creditor existed between the insurance company and the beneficiaries named in the policy. The unpaid premiums, with legal interest from the date they became payable, constituted a claim on behalf of the insurance company to be deducted when the company paid the amount due on the policy; thus leaving it in precisely the same situation in which it would have been if the premiums had been paid when they became due. The complaint stated a good and complete cause of action. There could not be any forfeiture of the policy unless the insurance company in its answer alleged, and, if a trial was had, proved, non-payment of a premium due, after regular service of the notice of non-payment as required by the statute. Carter v. Insurance Co., 110 N. Y. 16, 17, N. E. 396; Phelan v. Insurance Co., 113 N. Y. 147, 20 N. E. 827; Baxter v. Insurance Co., 119 N. Y. 450, 23 N. E. 1048; De Frece v. Insurance Co., 136 N. Y. 144, 32 N. E. 556; Griesemer v. Insurance Co., 10 Wash. 203, 38 Pac. 1031; Griffith v. Insurance Co., 101 Cal. 627, 642, 36 Pac. 113; Osborne v. Insurance Co. (Cal.), 56 Pac. 616; Hicks v. Insurance Co., 9 C. C. A. 215, 60 Fed. 690, 692; Mullen v. Insurance Co. (Tex. Sup.), 34 S. W. 605.

The plea of estoppel, as set forth in the third affirmative defense, is but another name for waiver. There is no question concerning the plea of estoppel that can be distinguished from the question as to the plea of waiver. As the parties could not waive the requirements of the statute as to the manner in which the policy could be forfeited, how could the beneficiaries, who had vested rights therein, be devested of such rights, except in the manner provided by law? They certainly could not be bound by any declarations which their father may have made in his lifetime to any agent or officer of the insurance company as to his inability to pay the premium then due upon the policy, or that he did not intend to pay that or any

future premium, or that the insurance company might consider the policy forfeited without giving the notice specified in the statute. To so hold would entirely abrogate the provisions of the statute and of the policy. As was said by the Court in Baxter v. Insurance Co.:

'When the provisions of this statute are adopted in a contract of insurance for the purpose of modifying the forfeiture clause and the other strict conditions costained therein, then the clause and these conditions should be so construed as to give to the assured the full benefit contemplated, without altering any other provision of the policy, if this can be done without violating any rule of law.' " (P. 267-270.)

The same views were reasserted in the case of Mutual Life Insurance Co. vs. Dingley, 100 Fed. 408. (Since reversed by this Court.)

"It is contended that the Court erred in sustaining the demurrer to the affirmative matter of the answer, which alleged that the insured informed the insurance company that he recognized that the contracts of insurance were lapsed, and that he refused to continue his policies, and that it was then mutually agreed between the contracting parties that the policies were lapsed and terminated. It is not asserted that the contracts of insurance were declared forfeited by an instrument under seal, or that any consideration passed to the insured for the cancellation thereof. The matters so pleaded evidently rested in parol. Such oral statements could be of no more binding effect than the express written waiver which was contained in the policies. We have already decided that the parties to an insurance contract cannot be permitted by parol agreement to annul the express provisions of the statute (Society v. Trimble, *supra;* Same v. Nixon, *supra*); and further consideration only confirms our conviction of the correctness of that view. In the Nixon case it was said:

'The statute of New York prescribes the condition upon which a policy may be forfeited for the non-payment

of a premium. The statute is mandatory and controls the contract. Its provisions are not subject to be set aside or waived either by the company or the assured, or by both together.'

Nor can any ground of equitable estoppel arise from the default of the assured in the payment of premiums or any of the facts set forth in the answer. It is not shown that the relation of either party to the contracts was changed, or that the insurance company did or refrained from doing any act to its injury in reliance upon such parol statement of the insured.

It is contended, further, that the New York statute is limited in its application to business done in the state of New York, and applies only to policies issued and delivered in that state to the citizens thereof. The language of the statute is broader than this. It reads: 'No life insurance company doing business in the state of New York shall have power,' etc. The company was a New York company, doing business in that state, and comes within the precise words of the statute. If it had been the intention to restrict the benefits and protection of the statute to the citizens and residents of the state of New York, it is reasonable to presume that that intention would have been expressed. It must have been known to the lawmakers that certain of the life insurance companies of New York were doing an extensive insurance business with residents of other states. The language of the statute extends to all business done by such companies. Its very terms preclude a narrow construction. Hebb v. Insurance Co., 138 Pa. St. 174, 20 Atl. 837; Association v. Musser, 120 Pa. St. 384, 14 Atl. 155; Association v. Ficklin, 74 Md. 172, 21 Atl. 680, 23 Atl. 197; Insurance Co. v. Fields (Tex. Civ. App.), 26 S. W. 280."

Entertaining these views of the nature and effect of the New York statute, and of its control over the power of the parties to alter or deal with the contract,—for that court to hold that the effect of the reversing opinions of this

Court was to affirm this case in all respects,—save the single issue upon which the Circuit Court held it was remanded for trial,—is to nullify the meaning and effect of this Court's opinions. The different interpretation of the New York statute, and its application to the facts of the case expressed by this Court, operated not only as a reversal of the decision of the lower courts, but remanded the case for a new trial, in accordance with the views and interpretation of the New York statute given by this court, in accordance with the spirit of its opinions.

IV.

DID THE PROVISION IN THE APPLICATION FOR INSURANCE, THAT THE CONTRACT, WHEN MADE, SHOULD BE CONSTRUED TO HAVE BEEN MADE IN THE CITY OF NEW YORK, BRING IT UNDER THE STATUTE OF NEW YORK, SO THAT THE REFUSAL OF HILL TO MAKE PAYMENT OF THE PREMIUM COULD NOT AND DID NOT TERMINATE THE POLICY?

We contend this provision did not have such effect, nor did it take the case out from the rules laid down by this Court. That provision in the application follows the statements and representations of the applicant and is as follows: "And it is agreed that there shall be no contract of insurance until a policy shall have been issued and delivered by said company, and the first premium thereon paid, while the person proposed for insurance is in the same condition of health described in this application; and if said policy be issued, the declarations, agreements and warranties herein contained shall be a part thereof, and the contract of insurance, when made, shall be held

and construed at all times and places to have been made in the city of New York." (Petition 5.)

It must be kept in mind the contract came into being in Seattle. There Hill resided and had his only post office address. There he and the company, in the person of its agent, were present when the first payment was made, and the policy was delivered. The application begins as follows:

"APPLICATION to THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK FOR A FIVE YEAR DISTRIBUTION POLICY. Subject to the Charter of said Company and the Laws of said State." (Rec. 71.) And upon it is printed, "Special Notice to Applicants and Policy Holders." "4th. Policy-holders must not expect to be notified when their premiums will be due. It is a practice of the Company to send these notices, as reminders, when the address is known, but no responsibility is assumed on the part of the Company in consequence of their non-reception." (Record 74-75.)

And that the policy itself contains the following stipulation: "Notice that each and every such payment is due at the date mentioned in the policy, is given and accepted by the delivery and acceptance of this policy, and any further notice required by any statute is thereby expressly waived." (Rec. 7. Petition 7.) Such a contract entered into at Seattle, with these specific stipulations, is fully dealt with in the Cohen case, in which at page 267, 179 United States, the Court says:

"It is not doubted that a contract by an insurance company of New York, executed elsewhere, may by its terms incorporate the law of New York, and make its provisions controlling upon both the insured and the insurer."

The Court under this proposition proceeds to demonstrate that the parties sued may incorporate in a part of their contract certain laws of New York, but leave the contract in all other respects unaffected by the laws of that state. It is said the parties may thus agree that the application "is subject to the charter of the Company and the laws of said state. * * * But that is very different from a provision that the contract issued upon such application, should also be in all respects controlled by the laws of New York." (179 U. S. 267.)

Now, under the circumstances, and with these specific stipulations, the parties at Seattle could have agreed that the contract there made, *when* made, "shall be held and construed at all times and places to have been made in New York city." But this, we submit, is a very different thing from stipulating that the subsequent matter of giving notice of the due date of premiums shall be incorporated in the contract, or that the contract shall be *construed* by the laws of New York.

Ex industria it was stipulated at the beginning of the application that the *application* shall be subject to the charter of the Company and the laws of said state, and with equal pains it was expressly stipulated in the policy itself, that as to the payment of premiums, no other notice than that contained in the policy, should be given, and every doubt was eliminated by the further language, "and any further notice required by any statute is thereby expressly waived." (Petition 7-8.) If parties by their convention or stipulation, may incorporate certain of the laws of New York into the preliminary part of their contract, by the same power they may exclude other statutes from other portions of the contract. The laws of New York were placed in the stipulation by contractual arrange-

ment, and the notice-statute was left out of the policy by the same authority. No room is left for inference that the New York notice-statute was incorporated in this policy, or controlled it, in the face of the express stipulation that it was excluded from it, and that a certain stipulated arrangement as to notice was provided, *any statute* to the contrary notwithstanding.

The Circuit Court of Appeals has practically, and, we think, directly, held that the meaning and legal effect would be precisely the same in each of the following contracts of insurance:

(*a.*) A contract made in the state of Washington, but by a stipulation in it, after being made, to be held and construed to be made in the city of New York, and containing the two following express provisions:

The one that the *application* on which the policy rests, and which is a part of the contract, is *subject* to the laws of New York, and the other that the policy fixes the only rule of notice regarding the due-date of premiums, and also declares that the notice required by the statute of New York upon that subject is expressly waived.

(*b.*) A contract entered into in Washington, which not only provides that after it is made it should be construed and held to be made in New York city, but in addition, provides it shall be *subject* to the premium notice statute of the state of New York (as was provided respecting the *application* in this and the Cohen case); and

(*c.*) A contract made in the state of Washington, containing a stipulation that it shall, when made, be construed to be made in New York city, and containing the additional stipulation "to be executed in New York, and construed only according to the laws of that state" (as

in the case of Baxter vs. Brooklyn Life Ins. Co., 119 N. Y. 450-454. See 179 U. S. 267-8).

Such a contention can only be sustained upon the ground that contracting parties, by incorporating into their agreement a contractual provision that a certain portion of their contract shall be subjected to the laws of another state, thereby draw down upon and into their contract, the whole system of laws and policies of that state, so far as it relates to the entire subject matter of their contract, not by way of convention or contractual arrangement, but by their legislative and governmental force, independently of, and contrary to, their stipulations. It was demonstrated in the Cohen case that both the reason and the meaning were clear why a preliminary contract such as an *application* with its representations and warranties, should be made subject to and controlled by the statutes of New York, while the parties might desire to be left their freedom of contract in all other particulars. It can be urged with equal reason and conclusiveness that with the insured, George Dana Hill, having no post office address in the state of New York, and none nearer that state than Puget Sound, which, in April, 1886, was practically extremely remote and difficult and uncertain of being reached by mail, neither party to the contract was willing to stipulate to such a method of notice as that contained in the New York statute; and for that reason, not only declared in their contract that they would not adopt this statutory notice, but instead agreed to a notice of their own provision, mutually satisfactory. In the face of such an express agreement, and the apparent reasons for it, judicial inference should not be indulged in to destroy this arrangement and substitute for it what the parties had specifically discarded.

V.

DOES THE FACT THAT THE INSURANCE IS PAID TO MINOR BENEFICIARIES REQUIRE THAT NOTICE SHOULD HAVE BEEN GIVEN TO SUCH BENEFICIARIES, OR THAT THEY SHOULD, AFTER BEING FULLY ADVISED OF THE INSUPED'S FAILURE TO PAY, HAVE ACQUIESCED IN WHAT HE DID OR OMITTED TO DO?

It will be noted the New York statute does not recognize a beneficiary as a party to be affected by that statute. If in the transaction of business in the state of New York an insurance company proposes, independently of agreement or conduct, or omission on the part of the insured, to declare a forfeiture in the statutory method, it is required in doing so to give notice to but one of two persons—the insured or his assignee.

In the matter of notice under this statute the beneficiary is not known. With him the company has nothing to do. Giving the statutory notice to the beneficiary would avail nothing to the insurance company in the way of declaring a forfeiture, because the beneficiary might carry such notice into court as proof of non-compliance with the statute, in giving notice to an unauthorized person. We take it, so far as the payment of premiums is concerned, and all matters relating to the continuance of the policy, the insured is the principal, but if not the principal then he is the general agent or trustee of the beneficiary, with an irrevocable authority. Entering into a policy of insurance between the insured and the company does not of itself render the beneficiary a party to the contract. Something more is required. Against his will he cannot be made a beneficiary. In some manner or other his acqui-

escence in the contract so as to bring him as a party into it must be with his actual or presumed consent. The fact of benefit would no doubt furnish the presumption of assent, and would be deemed satisfactory evidence of acceptance, only to be overcome by proof of repudiation.

In Lamber vs. Penn. Mutual Life, 24 So., 18, it is said:

"At common law a stipulation in favor of a third person if for his benefit is presumed to be accepted by him."

And in Dunlap vs. Dunlap (Mich.), 53 N. W., 788, the court says:

"There is no force in the objection that there could be no valid gift to Joseph and Elon without an acceptance on their part. The donation being for their advantage, they will be deemed to have accepted it, unless the contrary appears." (p. 790.)

The proof by which the relation is established does not affect the fact that the beneficiary becomes a party thereto, by the adoption of the contract, entered into for his benefit. He can only adopt it as an entirety. He must take the contract just as it has been made, and upon the conditions imposed. In so taking it, he of necessity accepts the insured as his general agent, or trustee, with full power and authority. In claiming as a beneficiary he must assent to the authority of the insured and adopt his acts as those of the beneficiary.

In "The Lucy Anne," 3 Ware, 253, the court says:

"The donor may annex such conditions to his bounty as he pleases; nor at least when he has an interest in his liberality can the beneficiary repudiate the conditions without the consent of the donor. He cannot take that as a free gift to which a condition precedent is annexed." (p. 256.)

This rule applies, regardless of the capacity or incapacity of the donee, else minors and others laboring under inability could not accept or become the beneficiaries of conditional gifts.

Unless the beneficiary, as the third person for whose benefit the contract is made, accepts it as entered into by the insured and the insurance company, there can be no acceptance, and hence no contract. To vary the terms of a contract or accept it so far as beneficial and reject what is not desirable is not in the power of the beneficiary.

In National Bank vs. Hall, 101 U. S., 43, at page 50, it is said:

"A proposal to accept or acceptance upon terms varying from those offered is a rejection of the offer."

Baker vs. Johnson County, 37 Ia., 186.

See also Jenness vs. Mt. Hope Iron Co., 53 Me., 20, and Chicago & Great Eastern Railway Co. vs. Dane, 43 N. Y., 240, and Suydam vs. Clark, 2 Sandf. (N. Y.), 133.

And again in Minneapolis, etc., Ry. vs. Columbus Rg. Mill, 119 U. S., 151, it is said:

"A proposal to accept or an acceptance upon terms varying from those offered is a rejection of the offer, and puts an end to the negotiation unless the party who made the original offer renews it or assents to the modification suggested."

The necessity for acceptance upon the terms of the offer made in order to establish a contract is stated thus in Campania Bilbaina vs. Spanish Am., etc., Co., 146 U. S., 497:

"The contention of the libelant is that the instrument became binding on the parties with the exception of the particular clauses referred to, if the libelant should dis-

sent from those clauses. Thus the same effect is claimed as if the charter party had been returned to the persons who had signed it and the clauses referred to had been erased by mutual consent. But if there is any part of it in regard to which the minds of the parties have not met, the entire instrument is a nullity as to all its clauses."

It matters not whether the beneficiary be a person of capacity or incapacity; in either event, by the very fact of becoming a beneficiary, he subordinates the favors he receives to the conditions and methods of their bestowal. He cannot compel the insured to pay an additional premium. He cannot restrain the insured from absolving himself from the contract. So long only as the insured chooses will he keep the contract alive. The beneficiary, so long as he has the benefit or gratuity through *the favor* of the insured, must abide the consequences of the latter's acts and omissions, as his agent with full authority, in keeping alive or terminating the policy. It may be said that if the beneficiary, after the contract had been entered into, sees fit himself to go to the insurance company with premiums as they fall due and make actual tender, he can do so and the insurer will be bound to accept such payments, but that is entirely aside from the statute of New York, and aside from the provisions of the policy so far as the insured is concerned, and as it is admitted the beneficiaries never tendered or offered payment of any premium, that question cannot arise in this case. If it be true that the insured was the general agent of the beneficiary, with full authority in all matters pertaining to the payment of premiums, then they are bound precisely as if they themselves had done or omitted the things that Hill did and omitted, and the case comes exactly under the rule laid down in this action when before this Court, where it said:

"But it is alleged, not only that the insured and the company agreed to abandon the contract, but also that the beneficiary, his wife and the plaintiffs, their children, failed, neglected and refused to pay the premium, so we have a case in which not only did the insured and the company abandon the contract, but also the beneficiaries neglected and refused to do that which was essential to keep the policy in life." (178 N. S., 350.)

We note in passing, the pleadings fully justify this Court in the view that the "beneficiaries neglected and refused," but the court did not limit the determination of the contract to such "refusal." It said such refusal was sufficient. It did not say that anything else would not be sufficient. We ask the court to bear in mind, along with this contention we are making, that the insured stood as principal, and the only person with whom the insurance company had to deal, as the facts disclose in this record. That the beneficiaries, children of the insured George Dana Hill, were inmates of his home, and a part of the family of which he was the head from the date of his application to the time of his death, and were under his parental care. (Rec. p. 84.) So that he stood, not only as principal, if our contention be correct, but if as guardian or trustee of the beneficiaries—who were instead of himself principals—then they must abide by the consequences of the acts or omissions of their agent.

The sole excuse the children of Hill urge for nonpayment of premiums is that statutory notice was not served upon Hill, but this failure to serve notice did not in any way prevent them from paying or causing the premiums to be paid.

In the case of Wheeler vs. Conn. Mut. Life, 82 N. Y. App., 543, the policies had been assigned by one Vose,

the insured, to his children, for whom he was general guardian. Vose became insane. This was held not to relieve the children.

"Although Vose was their guardian, if incapacitated by his insanity, a competent person could have been appointed in his place, and hence his insanity was not necessarily an insuperable obstacle to their performance of the condition of the policy, and they were not relieved thereby." (p. 550.)

In Klein vs. Insurance Co., 104 U. S., 88, a policy of insurance was issued upon the life of one Frederick W. Klein, payable to his wife, Clara Klein. One of the conditions of the policy was if the stipulated premium should not be paid on or before a certain day the policy should cease and determine. The semi-annual premium, due on the policy March, 1871, was not paid. The wife alleged as a ground of relief that Klein without her knowledge had taken out the policy; that she had received no information of its terms and conditions until after his death; about February 1st he was taken down by the illness from which he died, and that on account of his condition he was incapable of attending to any matters of business, and for that reason failed to pay the premium when it became due. The bill was dismissed in the lower court, and on appeal the Supreme Court affirmed the decree. Mr. Justice Woods, in the opinion, page 92, states:

"She (the wife) was never incapacitated from making payment. The alleged fact that she had no knowledge of the existence and terms of the policy does not relieve her default. If the fact be true, her ignorance resulted from the neglect of her husband, who, in respect to this contract of insurance, was her agent, in not informing her about the insurance on his life, and the term of the policy. The bill is therefore an effort by her to

obtain relief in equity against the appellee from the consequences of the carelessness or neglect of her own agent."

Knickerbocker Life Ins. Co. vs. Pendleton *et al.*, 112 U. S., 696, was a case where a policy of insurance was issued on the life of one Samuel Pendleton for the benefit of the plaintiffs, as the children of the said Samuel H. Pendleton. The policy was conditioned to be void if the annual premium or any obligation given in payment thereof should not be paid at maturity. The annual premium due in July, 1871, was paid by a foreign bill, drawn by the insured, with the condition that the policy should be void if the draft was not paid at maturity. The bill was presented and not accepted on account of want of funds in the hands of the drawee. In the opinion, at page 708, Mr. Justice Bradley says:

"The drawer (Pendleton), who took entire charge of the policy for his children, put its existence upon the condition of the payment of the draft at maturity; and it was his business, as agent and guardian of his children, to see that the draft was thus paid, that the requisite funds were in the hands of the drawees, or that they would pay it whether in funds or not."

In Miles vs. Connecticut Life Ins. Co., 147 U. S., 177, the insurance company issued a policy for $5,000 upon the life of John S. Miles for the sole use and benefit of Sarah G. Miles, his wife. It was at the instance of the insured that the policy was issued, and he paid with his own money all of the premiums. Before the tenth premium became due the insured advised the company that he could not pay that premium and wished a paid-up policy. The company advised him not to do so, but to have so much of the $5,000 released as would enable him, wtih the sum allowed for such release, to pay what would be due as a premium on

the remainder. This was agreed to, and a receipt was presented to him, signed by his wife, for $82.39, as a consideration for the release of $700 of the $5,000, the $82.39 being applied towards a premium on the $4,300. Thereupon the husband received a policy for $4,300 on his own life for his wife's benefit. Subsequently he took a paid-up policy for $1,195 in the same favor, having given what purported to be a receipt signed by the wife. It appears that the wife's name on both receipts was signed by the husband without her assent. In suit on the $5,000 policy brought by the wife the company set up non-payment of premium.

The court held that it was a good defense, and that there was nothing to justify the failure to pay the premium.

In Schneider vs. U. S. Life Insurance Co., 123 N. Y., 109, the court held that a married woman in whose favor a policy of insurance was issued upon the life of her husband could not claim the benefit of the insurance without at the same time assuming all the responsibility of a failure to perform its essential conditions, among them being the payment of premiums.

In the opinion of O'Brien, J., at page 114, it is stated:

"The husband had the possession of the policy, and in dealing with the defendant in regard to it was treated as plaintiff's agent, and the rule that when one of two innocent parties must sustain a loss from the fraud of a third, such loss shall fall upon the one whose act enabled the fraud to be committed, applies to this case."

See also Manhattan Life Ins. Co. vs. Smith, 44 Ohio State, 156.

In Baker vs. The Union Mutual Life Ins. Co., 43 N. Y. App., 288, the court says:

"The case will not be changed if the policy is regarded as having been procured by the plaintiff, and as the result of an agreement made between her and the defendants. The husband of the plaintiff was the actor in the transaction, and represented the plaintiff; and claiming the benefit of his acts and of the policy procured by his agency, she necessarily ratifies and affirms the contract as it was made, with all its terms and conditions. She adopts the acts of the agent and makes them her own. (Elwell vs. Chamberlain, 31 N. Y., 611; Bennett vs. Judson, 21 *id.*, 238.) If the agent exceeds or transgresses his authority, the principal may repudiate his acts altogether, but he cannot affirm in part, and repudiate in part; take the benefit of the favorable parts of a contract and reject the residue."

In Whitehead *et al.* vs. New York Life Ins. Co., 102 N. Y., 143 (6 N. E. 268), a husband procured a policy of life insurance upon his own life for the benefit of his wife, or, in case of her death before his, of their children. Held, that the husband had no authority without the assent of the assured to surrender the policy, such an act not being within the scope of the agency inferable from the taking out of the policy by him; but where such a policy by its terms has become forfeited for failure to pay premiums, the husband may thereafter, in consideration of a sum paid, surrender it. In such case the forfeiture is not waived by the surrender and the assured could not repudiate the surrender and at the same time assert the revival of the policy under it.

Finch, J. (p. 150):

"He (the insured) therefore, in procuring the policies to be made, in paying the premiums, in receiving and acting upon notices and in doing whatever was necessary to perfect and continue the rights of the assured, must stand in the attitude of an agent, acting for and representing the

assured, and as having no interest in the policies, unless, possibly, after the death of all of the assured."

Holmes vs. Gilman, 138 N. Y., 369, 381, 382, is to like effect.

In Mechem on Agency, Section 775, the author states the rule as follows:

"Hence it is a rule of universal application, whether the principal be disclosed or not at the time of entering into the contract, that the principal is affected by, and is subject to, every defense which the other party may have, based upon such fraud, imposition, misrepresentation, concealment or other misconduct of the agent as is, either by a prior authorization or a subsequent ratification, properly chargeable to the principal as having been done or committed by the agent within the scope of his authority, although the principal himself may have been entirely innocent."

VI.

PLAINTIFFS BELOW WERE IN NO WISE PARTIES TO THE CONTRACT OF INSURANCE, BUT DONEES BY REPRESENTATION, THROUGH THEIR MOTHER.

We have shown the application, signed by Hill. It is also noted that it was signed as follows:

"Signature of the person to whom the insurance is payable, Ellen Kellogg Hill, by G. D. Hill."

The application also contains the following:

3. A. Name of person to whom insurance is payable at death? B. Residence? C. Relationship?	A. Ellen Kellogg Hill. B. Seattle, W. T.; C. Wife.

4.	A. If a life policy for the benefit of the wife, shall it be paid to her children, to your children, or to the children of the two, if she be not living at the maturity?	A. To the children of two."

It is thus seen the mother, Ellen Kellog Hill, was the primary beneficiary. The children were the second beneficiaries, and were not even third parties, so to speak, to the contract. Had the mother—who joined in the application—survived and brought this action—it could not be successfully contended she would not be bound and estopped, as Hill himself. The children became beneficiaries only through representation of the mother and hence were relegated to her position. If the mother was not living the policy was payable "to such of the children of their bodies as shall be living." The children took, through their parent. Certainly whatever bound the father and the mother would equally bind the children. The only interest they have in the contract is such as they derived through the application of the parents. They cannot, therefore, contend that they were ignorant of what both of their parents knew, and that they were without knowledge of when the premium became due, and of the demand of payment from their father and natural guardian. The insured had full knowledge.

VII.

SUMMARY UPON THE LAW AND FACTS OF THE CASE.

1. By payment of premium, and delivery of policy, the contract actually came into being in Washington and under the Cohen case became a Washington contract.

2. The insured from the date of the application to his death was a resident of Washington, and had no post-office address in the State of New York. Therefore, the law of New York is inapplicable to this case, because it relates only to instances where the insured or his assignee has a postoffice address within that state. This is a deduction fairly drawn from the Cohen case.

3. The insured was an experienced business man. Personal demand was a number of times made upon him for the premium of 1887 and proper receipt tendered. He declined in each instance to make payment, and suffered the renewal receipt to be returned to the home office, and never again offered payment or askd a renewal of his policy. Upon the faith of his conduct the policy was entered upon the books of the company as lapsed and terminated, and the contract abandoned by the insured. This Court has ruled the New York statute imposed no restraint whatever upon the insured, and left the parties in their mutual relations as free as if it had not been enacted. In any other contract, a failure for four successive years to make annual payments upon a contract as a condition of its continuance, would defeat the defaulting party in an action in the nature of specific performance. Under the decision in the Phinney case this action cannot stand.

4. The insurance company does not rely upon the statute of New York and a forfeiture under it, but it does

rely upos the defense of the insured, having been the *actor,* and *his* conduct terminating this contract. He deliberately chose to violate his contract, to decline and refuse to pay the premum, and to persist in this course for four years, until his death. The Court has held the New York statute in no manner touched or restrained him.

5. If the contract is regarded as a New York contract, it must be so, not as a matter of fact, but by fiction, intendment and convention of the parties, and it will not be so regarded, simply for the purpose of working injustice and building up an otherwise defeated claim.

6. The contract was actually entered into in the state of Washington, and can only be deemed made in New York for the purpose of coming under the operation of the New York statutes, because it is supposed the parties desired the laws of that state to operate upon the contract; but inference and intendment must give way to *fact,* and the fact is that so far as the *application* is concerned, the parties have made *that* portion of the contract *subject* to the laws of the state of New York; and it is equally certain that so far as the after-matter of notice of the due date of premiums, they have made their own express stipulation, and eliminated the statute of New York.

7. The insurance company is a mutual association. Its members are its premium paying policy holders. The funds from which their insurance is paid is supplied by the aggregate of promptly paid premiums, and the income therefrom. Existing members remain, and new members join the association, on the faith of this fund belonging, proportionately, to the contract-performing members in payment of original insurance, increase of policy or reduction of premiums. One premium only having been

paid on this policy, no claim upon the fund exists in favor of Hill or of anyone claiming under him.

8. The insured Hill was the only person under the New York statute—if it applies—with whom the insurance company had anything to do. That statute provides for notice upon the insured and his assignee only. It contemplates no notice upon the beneficiaries, either primary or secondary.

9. If Mrs. Hill, instead of plaintiffs below, were claiming this insurance, she would be estopped, because, having signed the application of insurance, she brought herself within the contract, so as to know or be bound know, its terms. If Hill, as we contend, was the principal in the contract—she receiving the gratuity of his bounty, did so, upon the terms in which he made the contract, and with knowledge that his refusal or conduct could terminate this contract as any other he might enter into. That he was at liberty to pay or decline to pay premiums, or to continue or end the contract. If it is claimed she was the principal and Hill her agent, then she was bound by her agent's act, and could not claim the benefit of the policy without ratifying and assuming whatever he may have done or declined to do in the way of keeping the policy alive.

10. The plaintiffs below were not parties in any manner to the application for the policy of insurance. They never could come under its benefits, except subsequent to its execution and delivery, and until their mother's death, so that they claim under their mother, and whatever would bind her equally binds them.

11. In any event they are the beneficiaries of a gift or gratuity, and can only accept such gift or benefit upon

the terms and conditions upon which it was given, and by the act of acceptance must adopt and ratify the contract, just as it was made with the insured. This conclusion would have made it necessary for them, if principals, to see to it that their agent performed the contract by paying the insurance, or that he abstained from refusing to make payment and abandoning the contract.

The case upon its facts is before this Court, as it was at each stage before the lower courts, and we submit, upon the unquestioned facts and the law, judgment should be rendered in favor of the plaintiff in error.

Respectfully submitted,

JULIEN T. DAVIES,
EDWARD LYMAN SHORT,
JOHN B. ALLEN,
FREDERICK D. McKINNEY,

Attorneys for the Mutual Life Insurance Company of New York, Petitioner.

APPENDIX

NEW YORK PREMIUM NOTICE STATUTES.

L. 1876 Ch. 341 (May 15, 1876), amended by

L. 1877 Ch. 321 (May 23, 1877), repealed by

L. 1892 Ch. 690, Sec. 295 (took effect Oct. 1, 1892), new statute enacted by

L. 1892 Ch. 690, Sec. 92 (took effect Oct. 1, 1892), amended by

L. 1897 Ch. 218 (took effect April 8, 1897).

LAWS OF 1876.

CHAPTER 341.

An Act regulating the forfeiture of life insurance policies.

Passed May 15, 1876.

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. No life insurance company doing business in the State of New York shall have power to declare forfeited or lapsed any policy hereafter issued or renewed, by reason of non-payment of any annual premium or interest, or any portion thereof, unless a notice in writing, stating the amount of annual premiums or interest due and when due on such policy, and the place where said premium or interest may be paid, shall have been duly addressed and mailed by the company issuing such policy to the

insured, postage paid, at his or her last known post office address, not less than thirty nor more than sixty days next before such payment becomes due, according to the terms of such policy.

Sec. 2. The affidavit of any officer, clerk or agent of the company that the notice to the assured, provided for in section one has been duly addressed and mailed by the company issuing such policy to the assured, shall be presumptive evidence of such notive having been duly given.

Sec. 3. This act shall take effect immediately.

LAWS OF 1877.

CHAPTER 321.

An Act to amend chapter three hundred and forty-one of the laws of 1876, entitled "An Act regulating the forfeiture of life insurance policies."

Passed May 23, 1877.

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Section one of chapter 341 of the laws of eighteen hundred and seventy-six, entitled "An Act regulating the forfeiture of life insurance policies," is hereby amended so as to read as follows:

Sec. 1. No life insurance company doing business in the State of New York shall have power to declare forfeited or lapsed any policy hereafter issued or renewed by reason of non-payment of any annual premium or interest, or any portion thereof, except as hereinafter provided. Whenever any premium or interest due upon any such policy shall remain unpaid when due, a written

or printed notice stating the amount of such premium or interest due on such policy, the place where said premium or interest should be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is assured, or the assignee of the policy, if notice of the assignment has been given to the company, at his or her last known post office address, postage paid by the company, or by an agent of such company or person appointed by it to collect such premium. Such notice shall further state that unless the said premium or interest then due shall be paid to the company or to a duly appointed agent or other person authorized to collect such premium within thirty days after the mailing of such notice, the said policy and all payments thereon will become forfeited and void. In case the payment demanded by such notice shall be made within the thirty days limited therefor, the same shall be taken to be in full compliance with the requirements of the policy in respect to the payment of said premium or interest, anything therein contained to the contrary notwithstanding; but no such policy shall in any case be forfeited or declared forfeited or lapsed until the expiration of thirty days after the mailing of such notice. Provided, however, that a notice stating when the premium will fall due, and that if not paid, the policy and all payments thereon will become forfeited and void, served in the manner hereinbefore provided, at least thirty and not more than sixty days prior to the day when the premium is payable, shall have the same effect as the service of the notice hereinbefore provided for.

Sec. 2. The affidavit of any one authorized by section one to mail such notice, that the same was duly addressed to the person whose life is assured by the policy, or to

the assignee of the policy, if notice of the assignment has been given to the company, in pursuance of said section, shall be presumptive evidence of such notice having been given.

LAWS OF 1892.

CHAPTER 690, SEC. 92.

Sec. 92. No forfeiture of policy without notice. No life insurance corporation doing business in this State shall declare forfeited, or lapsed, any policy hereafter issued or renewed, and not issued upon the payment of monthly or weekly premiums, or unless the same is a term insurance contract for one year or less, nor shall any such policy be forfeited or lapsed, by reason of non-payment when due of any premium, interest or installment or any portion thereof required by the terms of the policy to be paid, unless a written or printed notice, stating the amount of such premium, interest, installment, or portion thereof, due on such policy, the place where it should be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is insured, or the assignee of the policy, if notice of the assignment has been given to the corporation, at his or her last known post office address, postage paid by the corporation, or by an officer thereof, or person appointed by it to collect such premium, at least fifteen and not more than forty-five days prior to the day when the same is payable.

The notice shall also state that unless such premium, interest, installment, or portion thereof, then due, shall be paid to the corporation or to a duly appointed agent or person authorized to collect such premium by or before the day it falls due, the policy and all payments thereon

will become forfeited and void except as to the right to surrender value or paid-up policy as in this chapter provided.

If the payment demanded by such notice shall be made within its time limited therefor, it shall be taken to be in full compliance with the requirements of the policy in respect to the time of such payment; and no such policy shall, in any case, be forfeited or declared forfeited or lapsed, until the expiration of thirty days after the mailing of such notice.

The affidavit of any officer, clerk or agent of the corporation, or of anyone authorized to mail such notice, that the notice required by this section has been duly addressed and mailed by the corporation issuing such policy, shall be presumptive evidence that such notice has been duly given.

(The above act in Sec. 295 also repealed the acts of 1876 and 1877.)

LAWS OF 1897.

CHAPTER 218.

This act amended Sec. 92 above as follows:

"Sec. 92. No forfeiture of policy without notice.—No life insurance corporation doing business in this State shall within one year after the default in payment of any premium, installment or interest, declare forfeited or lapsed any policy hereafter issued or renewed, and not issued upon the payment of monthly or weekly premiums, or unless the same is a term insurance contract for one year or less, nor shall any such policy be forfeited, or lapsed, by reason of non-payment when due of any pre-

mium, interest or installment or any portion thereof required by the terms of the policy to be paid, within one year from the failure to pay such premium, interest or installment unless a written or printed notice stating the amount of such premium, interest, installment, or portion thereof, due on such policy, the place where it shall be paid, and the person to whom the same is payable, shall have been duly addressed and mailed to the person whose life is insured, or the assignee of the policy, if notice of the assignment has been given to the corporation, at his or her last known post office address in this State, postage paid by the corporation, or by any officer thereof, or person appointed by it to collect such premium, at least fifteen and not more than forty-five days prior to the day when the same is payable. The notice shall also state that unless such premium, interest, installment or portion thereof, then due, shall be paid to the corporation, or to the duly appointed agent or person authorized to collect such premium by or before the day it falls due, the policy and all payments thereon will become forfeited and void except as to the right to a surrender value or paid-up policy as in this chapter provided. If the payment demanded by such notice shall be made within its time limited therefor, it shall be taken to be in full compliance with the requirements of the policy in respect to the time of such payment; and no such policy shall in any case be forfeited or declared forfeited, or lapsed, until the expiration of thirty days after the mailing of such notice. The affidavit of any officer, clerk or agent of the corporation, or of anyone authorized to mail such notice that the notice required by this section has been duly addressed and mailed by the corporation issuing such policy shall be

presumptive evidence that such notice has been duly given. No action shall be maintained to recover under a forfeited policy, unless the same is instituted within one year from the day upon which default was made in paying the premium, installment, interest or portion thereof for which it is claimed that forfeiture ensued.

Sec. 3. This act shall take effect immediately.

INDEX.

PAGE.

Preliminary Statement..... 2

I

Statement of Prior Proceedings in this cause.... 3

II

Abstract of Pleadings..... 5

III

Chronological Statement of Facts..... 10

IV

Statement of the Case required by Rule 21..... 14

V

Statement of questions and issues as presented by the petition for the writ of certiorari..... 15

VI

Specification of Errors..... 19

Brief of the Argument..... 28

Point I.

PAGE.

THE RULINGS BY THE TRIAL COURT WHICH WERE AFFIRMED BY THE CIRCUIT COURT OF APPEALS WERE BASED UPON THE THEORY THAT THE TRIAL COURT UNDER THE MANDATE OF THIS COURT COULD ONLY CONSIDER THE QUESTION OF THE LEGAL EFFECT OF THE CONDUCT OF THE PLAINTIFFS THEMSELVES, AND THAT THIS COURT HAD DECIDED THAT IN THE HILL CASE THE NEW YORK STATUTE GOVERNED. THIS WAS CLEARLY ERRONEOUS... ... 28

Point II.

THE PREMIUM NOTICE STATUTE OF NEW YORK DOES NOT UNDER THE CIRCUMSTANCES PRESENTED CONTROL, AND THE RIGHTS OF THE PARTIES ARE MEASURED ALONE BY THE TERMS OF THE CONTRACT. THE PREMIUM FALLING DUE IN 1887 NOT HAVING BEEN PAID, THE INSURANCE, $20,000, IS NOT COLLECTIBLE (COHEN CASE, 179 U. S., 270)..... 39

The special clause in the Hill policy respecting the making of the contract was not *intended* to and *did not* put the New York Premium Notice Statute in operation in Washington, so as to govern the collection of the Hill premiums there, and this clearly appears from the following considerations:

(1.) There is no express reference in the policy to, or any incorporation therein of the premium notice statute as governing the parties, except to waive it..... 42

PAGE.

(2.) Such an intent to make the premium notice statute govern would be inconsistent with the clause in the policy expressly waiving any statutory notice..... 42

If Mr. Warburton claims that the waiver is invalid under the laws of New York, then the very fact that the stipulation as to waiver was introduced into the policy is cogent evidence of the intention that the New York statute should not govern, on the principle that when a contract is open to two constructions, the one lawful and the other unlawful, the former must be adopted.

(3.) The claim of the plaintiffs involves the finding of an express intent to make the New York notice statute which has no extra-territorial operation, operate extra-territorially, by agreement, the effect of which would be to change the statute by agreement. This intent is baseless and unreasonable. The statute is drawn with reference to New York business alone..... 42

(4.) The Baxter application and policy *were not similar* to the Hill application and policy, since the special clause in the Baxter policy had the words therein "and to be executed" and the application and policy were otherwise different also.... 42

(5.) *The special clause* covers primarily Laws of New York as to declarations, agreement and warranties in the application, and the legal situation is the same in this respect as in the Cohen case..... 42

(6.) Even if the policy had been actually made in the City of New York the notice statutes would not have operated upon the business of collecting its premiums in the State of Washington, even if

PAGE.

also it had not been waived. Part performance of the contract was to be in Washington, namely, payment of premiums..... 42

(7.) The intent of the parties, that the premium notice statute should not govern is still further indicated by the application of the *lex loci solutionis*, as the place of past performance in respect to the matter which is in dispute, the payment of premiums was in Washington and not in the State of New York..... 65

Point III.

EVEN IF THE NEW YORK STATUTE DOES CONTROL, THE CHILDREN OF HILL, BENEFICIARIES IN THE POLICY, ARE CONCLUDED BY THE FAILURE TO PAY THE PREMIUMS—HILL HAVING HAD THE EQUIVALENT OF STATUTORY NOTICE AND WAIVED THE SAME..... 76

(1.) The opposing claim is that if the premium notice statute governs then the children can recover because the Cohen case has so decided, but no such point was either discussed or decided in the Cohen case..... 77

(2.) Hill failed to pay the premium after actual notice to him, and abandoned the contract.

Such non-payment by Hill terminated the contract as against the children, as no one else on their behalf performed the necessary condition of payment..... 79

PAGE.

Actual knowledge by the insured of the premium being due possessed and acted upon by Hill and actual dealings respecting the payment of the premium was equivalent to serving the statutory notice if required at all in this case 86

(3.) There was no obligation on the part of Hill to pay premiums longer than he wished, and the beneficiaries had no contract right to require the insured to make payment 96

The insurance company by the contract and the statute, if applicable, dealt solely with the insured. If the insured failed or refused to make a payment at the due date, the contract was determined unless the beneficiaries or someone in in their behalf stepped forward and paid 96

(4.) Even if the statute otherwise would control, still the statutory notice was waived not only by special agreement in the policy, but also by Hill, the statutory agent to receive the notice, in that he received actual notice and did not insist upon the technical statutory notice 106

This notice statute was one which could be waived 107

None of the decided cases holding that this statute cannot be expressly waived, are either well considered or binding upon this Court 120

No one paid on behalf of the children..... 128

Point IV.

PAGE.

EVEN IF THE NEW YORK STATUTE CONTROLS, IT WAS NOT THE INTENTION OF THE NEW YORK LEGISLATURE TO KEEP THE POLICY ALIVE, AND ITS PROVISIONS UNIMPAIRED, NOTWITHSTANDING SUCCESSIVE DEFAULTS TO PAY THE PREMIUM AND THE ABANDONMENT OF THE CONTRACT..... 135

This would be an inequitable construction of the statute 135

A.

The intention to preserve the contracts only for a year, is clearly shown by the Amendment of 1897. 139

B.

The notice in Statute of 1877 referred to forfeiture of premiums already paid on policies, or the reserve thereon and to nothing else..... 142

Appendix.

A.—Opinion of the Supreme Court of the United States in Hill case, 178 U. S 347..... 153

B.—Opinion of the Supreme Court, State of Washington, Lone, Admr., *vs.* Mutual Life..... 154

C.—New York Premium Notice Statutes..... ... 159

In the Supreme Court of the United States,

OCTOBER TERM, 1903.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Plaintiff in Error,

vs.

ELIZA MAUD HILL, GEORGE E. HILL, ELLEN KELLOGG HILL and EUGENE C. HILL, by his Guardian, EBEN SMITH,
Defendants in Error.

No. 166.

On Writ of Error to the United States Court of Appeals for the Ninth Circuit. In error to the Circuit Court for the District of Washington, Northern Division.

Brief of the Mutual Life Insurance Company of New York, Plaintiff in Error.

Desinit debitor esse is qui nactus est exceptionem justam nec ab æquitate naturali abhorrentem.—MARCELLUS.

(He is no longer a debtor who has a defence that is righteous and consistent with natural equity).

PRELIMINARY STATEMENT.

There is no substantial difference between this case and the Cohen case (179 U. S., 363) so far as the premium notice statute of New York is concerned, so that the Plaintiff in Error claims that this case is disposed of in its favor by the Cohen case. The Circuit Court of Appeals in the Ninth Circuit did follow the Cohen case in Mutual Life *vs.* Hathaway, 106 Fed., 815, but refused to follow it in this case, and Chief Justice Holmes, now of this Court, followed the main principle of the Cohen case in Johnson *vs.* Mutual Life, 180 Mass., 407. The broadminded views of this Court have won over the Supreme Court of Washington. See Lone case in appendix to this brief; and in another case in the State of Washington, where claims such as these first originated, its Supreme Court said "the plaintiff has no "equities in this case, and, if he recovers at all, it must "be upon his strict legal rights. We think such rights "have not been shown, under the facts proven, and "that he has no just or legal demand against the ap-"pellant" (55 Pac. Rep., 429). In addition to the above point, however, the question of the effect under the New York statute of the failure to pay after actual notice to Hill and the abandonment of the contract may arise from the facts proved herein. The propositions involved in the case can be ultimately resolved into two simple contentions. No premiums having been paid after the first, the policy by its express provisions terminated, unless the non-payment was excusable. It was excusable, the plaintiff says, because no statutory notice was sent; but the Company claims no statutory notice was necessary; but if so, the insured who was the plaintiff's statutory agent had actual notice, did not pay, abandoned the policy, and no one else paid in their behalf.

Previous opinions in this case have been reported as follows:

Mutual Life *vs.* Hill, 97 Fed. Rep., 263 (Oct. 1899), Opinion of Circuit Court of Appeals prior to decision of this Court in Phinney, Sears, Allen and this case.

Mutual Life *vs.* Hill, 178 U. S., 347, Opinion of this Court prior to opinion in Cohen case.

Hill *vs.* Mutual Life, 113 Fed. Rep., 44 (Jan. 1902), Opinion by Hanford J. on retrial. See Record, p. 53.

Mutual Life *vs.* Hill, 118 Fed. Rep., 708. (Oct. 1902), Opinion by Circuit Court Appeals after retrial. See Record, p. 196.

I.

Statement of Prior Proceedings in this cause.

This action was commenced in the United States Circuit Court for the District of Washington, Northern Division, on the 19th day of October, 1895, to recover the sum of twenty thousand dollars ($20,000), with interest from January 3rd, 1891 (amount of principal and interest now about $32,000), claimed to be due on a policy of life insurance issued in 1886 by The Mutual Life Insurance Company of New York (Rec., 2, 9) and which was abandoned in 1887.

The answer was demurred to by the plaintiff and the Court sustained the demurrer to the answer and ordered

judgment for the plaintiff Hill in the sum of $24.086.80 (Rec., 22).

No opinion was rendered by Hanford, J., in sustaining the demurrer and ordering payment.

To reverse this judgment the defendant company sued out a writ of error to the United States Circuit Court of Appeals for the Ninth District.

For opinion of affirmance by Circuit Court of Appeals by Hawley, District Judge, concurred in by Gilbert & Ross, Judges, see 97 Federal Reporter, page 265.

In 1899, a petition for a writ of certiorari was filed by the defendant company in this Court.

Writ of certiorari was thereafter granted by this Court Feb. 5, 1900, and filed.

The cause was heard by this Court at the same time as the Phinney, Sears, Allen and Cohen cases in March, 1900, and is reported in 178 U. S., 347. A copy of the opinion of this Court is annexed to this brief as Exhibit A appendix. The cause was retried on the facts September, 1901, before Hanford, J. and a verdict rendered for the plaintiff, on which judgment was entered for $29,020.

Subsequently a motion was made for judgment in favor of the defendant *non obstante veredicto*, which motion was denied, and an opinion denying such motion was filed (by Hanford, J.) on January 23rd, 1902 (Rec., 53).

To reverse this judgment the defendant Company sued out a writ of error in the Circuit Court of Appeals, Ninth Circuit, and judgment was there affirmed (Rec., 206).

The opinion of the Circuit Court of Appeals will be found at page 201 of the Record. It is also reported in 118 Fed. Rep., 708.

In January 1903 a petition for a writ of certiorari was filed with this Court.

Writ of certiorari was thereafter granted by this Court, and the cause now comes before this Court on the writ of certiorari for hearing on the merits.

II.

Abstract of Pleadings.

AMENDED COMPLAINT:

The complaint in this action alleges that on the 29th day of April, 1886, the defendant company executed and delivered in the City of New York the policy in question for $20,000 and that the application for the said policy contained the following agreement:

> "And it is agreed that there shall be no contract "of insurance until a policy shall have been de- "livered and issued by said company, and the first "premium thereon paid while the person proposed "for insurance is in the same condition of health "described in this application, and that if said "policy be issued the declarations, agreements and "warranties herein contained shall be a part "thereof; *and the contract of insurance when "made shall be held and construed at all times "and places to have been made in the City of New "York*" (Record, page 8).

The above clause is made by the defendants in error, the bone of contention in this case.

That the policy was in favor of Hill's wife, if living, and if not, their children. That the wife predeceased Hill before 29th day of April, 1887. That the plaintiffs are their children.

That on the 4th day of December, 1890, George Dana Hill, the insured, died. That the said Hill during his

lifetime duly performed all the conditions of the contract (Rec., p. 11).

AMENDED ANSWER TO THE AMENDED COMPLAINT:

Subsequent to the reversal of the judgment by this Court on the previous trial, the defendant, with leave of Court, filed amended answer to the amended complaint on September 4th, 1901.

This answer, amongst other things, denied that the Company made or delivered the policy in the State of New York; it denied that the first premium was paid at any other place other than the State of Washington (Record, pages 13 and 14). It denied that Hill during his life performed all the conditions required to be performed, and denied that any premium whatever was paid upon the policy except the first premium (Rec. p. 14).

The answer then set up six affirmative defenses which are as follows:

1ST AFFIRMATIVE ANSWER AND DEFENSE:

Defendant alleges that the application was made in the State of Washington, and this application provided that there should be no contract of insurance until the policy was issued and delivered and the first premium paid. The policy was delivered and the first premium paid in the State of Washington.

It was provided by the policy that an annual premium of $814.00 should be payable on the 29th day of April in every year, and that any notice of such premium, statutory or otherwise, becoming due is waived, and that policy shall become void by non-payment of premiums, and all premiums paid should be forfeited.

The premium due on the 29th day of April, 1887, was never paid, and Hill and the plaintiffs failed, neglected

and refused to pay the premium. By reason thereof the policy lapsed (Rec., pp. 15, 16, 17).

2ND AFFIRMATIVE ANSWER AND DEFENSE:

Defendant alleges that the premium due the 29th day of April, 1887, was not paid, and defendant entered the policy on its books as lapsed and terminated, and at all times subsequent to April 29th, 1887, treated the policy as lapsed, terminated and void. That Hill never applied to have the policy restored, and at no time did anyone during the lifetime of Hill pay or offer to pay any premium, and by reason thereof Hill wholly abandoned the contract (Rec., p. 21).

3RD AFFIRMATIVE ANSWER AND DEFENSE:

Defendant alleges that it is a Mutual Company, and that the funds out of which its losses are paid arise out of its earnings as such mutual company and the premiums due upon its policies.

That Hill never paid any premium after the 29th day of April, 1887, and that the Company has a large number of other policies outstanding for the purpose of meeting its liabilities. It is necessary for every member of the Company to make payment of their premiums. By reason of the failure to pay the premiums the policy lapsed and the plaintiffs were estopped from claiming the policy to be an existing contract (Rec., pp. 22 to 26).

4TH AFFIRMATIVE ANSWER AND DEFENSE:

The policy in question was waived, abandoned, and rescinded (Rec., p. 26).

5TH AFFIRMATIVE ANSWER AND DEFENSE:

That on or about the 29th day of April, 1887,

the defendant notified and informed Hill that a premium was due, and demanded payment and tendered receipt, but that Hill being fully advised and informed refused to make payment, and then and there intending, and for the purpose of inducing defendant to rely upon his refusal, informed defendant that he was unable to pay the premium and did not intend to make any payment, but, on the contrary, intended to allow the policy to lapse and become terminated and waived for want of payment of said premium, and the defendant, relying upon said conduct of Hill, was induced to and did declare the policy terminated and abandoned, relying upon Hill's conduct (Rec., pp. 27 to 30).

6TH AFFIRMATIVE ANSWER AND DEFENSE:

That the Company, on the 31st day of December of every year, ascertains its liabilities, and by reason of the failure of Hill to pay the premium April 29th, 1887, defendant entered said policy upon its records as lapsed, and did not include the said policy as a liability, and Company and its members have acted on basis that said policy was not a liability. That the larger portion of the single premium paid was absorbed in payment of expenses; that the premium paid purchased one year's insurance, which expired April 29th, 1887, and defendant further alleges: That there never was in fact or in equity any balance or credit by way of surplus, accretion, reserve or otherwise due or owing upon said policy or to the said insured, or any of said plaintiffs; and defendant alleges that to allow recovery on said policy, which has not contributed in any manner to the reserve fund of defendant to meet its liabilities, tends to the disorganization and destruction of defendant's insurance business, and is inequitable to all of defendant's policy holders, and by reason of said premises

plaintiffs should be estopped from any recovery in this action (Rec., p. 30 to 32).

REPLICATION :

The replication of the plaintiffs admits that no premium was paid after the first annual premium, but alleges that no request was ever made of the plaintiffs to pay any such premium nor were the plaintiffs ever notified that any such premiums due were unpaid.

IN REPLY TO THE 2ND AFFIRMATIVE DEFENSE:

Plaintiffs allege that the first premium was paid to the agent of the defendant at the time of the delivery of the application (Rec., p. 36).

IN REPLY TO THE 3RD AFFIRMATIVE DEFENSE:

Plaintiffs admit that they did not pay any premium, but allege that no request was made, and defendants deny that the policy has lapsed or that they are estopped from claiming under the existing contract at the time of Hill's death (Rec., p. 38).

IN REPLY TO THE 4TH AFFIRMATIVE DEFENSE:

Plaintiffs deny all of the allegations in the 4th affirmative defense (Rec., p. 39).

IN REPLY TO THE 5TH AFFIRMATIVE DEFENSE:

Plaintiffs allege that the first premium was paid at the time the application was made, and that no other premium was paid, but allege no request and no notification was given them (Rec., p. 40).

IN REPLY TO THE 6TH AFFIRMATIVE DEFENSE :

Plaintiffs allege that the defendants were at all times ready to pay any premium that might become due on the

policy if they knew of its existence, but that no demand was made upon them or notice given and they knew nothing of the default until after the death of their father.

They further allege that Hill was never notified of the coming due of the premium (Record, p. 43).

III.

Chronological Statement of Facts.

1886, Apr. 28. Written application for insurance signed by George D. Hill, dated at Seattle, Washington, Apr. 28, 1886 (p. 74) witnessed by E. A. Turner, the soliciting agent at Seattle under Heisterman & Co. of Victoria (p. 111).

1886, Apr. 30. Written application of Hill forwarded by Heisterman & Co., Victoria, B. C., to Forbes, General Agent, San Francisco (p. 105).

1886, May 4. Forbes receives Hill's application (p. 126).

1886, May. Forbes forwards Hill's application to New York.

1886, May 13. Secretary Easton sends to Mr. Forbes from New York the Hill policy (p. 124).

1886, May 20. Mr. Forbes receives the Hill policy in San Francisco (p. 125).

1886, May 20. Forbes transmits Hill policy to H. F. Heisterman & Co , Victoria, B. C., saying: "I enclose for collection Policy 281470, Hill, Annual Prem. $814.00. Please collect and remit" (p. 127, 80).

1886, June 12. Hill paid Turner of Seattle his first premium on the delivery of policy which premium Turner transmitted to Heisterman & Co., who forwarded the same to Forbes, from Victoria B. C., (pp. 107, 109, 110).

1887, Feb. Ellen K. Hill, wife of George D. Hill, died (p. 82).

At this time the children were living with their father at Seattle, Washington (p. 84).

Eben Smith, although guardian of the children appointed after the death of Mrs. Hill, had never heard of the policy until after the death of Hill in 1890 (pp. 82, 83).

1887, April 29. *Second premium became due which was never paid.*

1887, May 31. Turner & Lewis of Seattle return to Forbes premium receipt of Hill for second premium due for 1887 uncollected, saying "We regret having to "return you herewith prm. receipts of "Hill, Berb & Budling, as uncol- "lected" We especially regret this in Capt. Hill's case as the policy is a large one, and his intention is to pay the premium, but he is short of money. He expects to have the money in a few days, and if you can hold the receipt for a few days we will notify you by wire as soon as premium is paid and you can forward us receipt" (113).

1887, June 3. Forbes, General Agents, acknowledge re-

ceipt of uncollected premium receipt returned by Turner & Lewis on Hill policy. Every facility was afforded by Mr. Forbes to enable Mr. Hill to pay the premium (p. 128).

1887, June 3. Forbes writes Turner: "If you wire me collection of Capt. Hill's renewal No. 281,470, April 29th, $814, so as to reach me on or before 13th, I will advance the prem. in my May a/c and await your remittance.

"After 13th a ctf. of health will be requisite. I enclose three blanks. Should you need them the enclosed will prove handy."

1887, June 6. Mr. Forbes returns the Hill renewal receipt, to Turner at Seattle saying: "Which I trust you will also be able to collect before the time mentioned in my advices, or, failing in that, that Mr. H., when able, will reinstate the policy, furnishing a certificate of his good health.

"We are anxious that Mr. Hill should not lose the benefit of premium already paid in" (129).

1887, July 8. Turner & Lewis of Seattle wrote the office of Forbes, General Agents returning receipt for the premium on policy No. 281,470, which they could not deliver (p. 115).

The receipt was signed by some general officer of the Company. On payment of the premium the agent is authorized to deliver the receipt. If the receipt

is not delivered it is returned to the General Agent, Mr. Forbes, who returns it to the Company (p. 116).

Mr. Howard H. Lewis, who was the local agent at Seattle, called himself upon Hill, and talked with him about the payment of the premium between May 31, 1887, and July 8, 1887 (pp. 113, 113, 115), and being unable to collect the money due under the receipt, returned the receipt to Mr. Forbes (p. 117). Mr. Forbes had a talk with his son between the 31st of May and the 8th of July in regard to this matter.

1890, Dec. 23. Smith & Kellogg *find policy amongst Hill's papers* and write to the Company (p. 81).

1891, Feb. 3. Company informed Smith, Executor, that the policy was forfeited for non-payment of the Apr. 30, 1887 premium (p. 82).

1895. *Present suit begun after Hanford, J., had decided in Phinney case on the first trial in favor of plaintiff.* George E. Hill never heard of the policy until after his father's death. Ellen Kellogg Hill never heard of the policy until after suit was begun. Eugene Hill never heard of the policy until after his father's death; Eliza Maud Hill, otherwise known as Mrs. Bowman, never heard of the policy until two or three years after her father's death (pp. 86, 87, 88, 89).

IV.

Statement of the Case Required by Rule 21.

The following statement presents succinctly the questions involved and the manner in which they are raised.

The first question is, whether or not the Circuit Court of Appeals erred in holding that under the mandate of this Court, the Trial Court and the Circuit Court of Appeals could only consider the question of the legal effect of the conduct of the persons themselves. This question is raised by the writ of certiorari granted by this Court (see Point I).

The second question is, whether the New York Premium Notice Statute of New York does or does not under the circumstances presented control, and the question is raised by the refusal of the Court to direct the jury to return a verdict in favor of defendant, and by the refusal of the Court to instruct the jury, as requested, and by the charge of the Trial Court to the jury and the assignment of errors based thereon (see Point II).

The third question is, whether or not, even if the Premium Notice statute controls, the plaintiffs are concluded by the failure to pay the premiums. This question is raised by the refusal of the Court to direct the jury to return a verdict in favor of defendant, and by the refusal of the Court to instruct the jury, as requested, and by the charge of the Trial Court to the jury and the assignment of errors based thereon (see Point III).

The fourth question is, whether it was or was not the intention of the New York Legislature to keep the policy alive and its provisions unimpaired notwithstanding successive defaults to pay the premium and the abandonment of the contract. The question is raised by the refusal of the Court to direct the jury to

return a verdict in favor of defendant, and by the refusal of the Court to instruct the jury, as requested, and by the charge of the Trial Court to the jury and the assignment of errors based thereon (see Point IV).

V.

Statement of questions and issues as presented by the petition for the Writ of Certiorari.

First.—Whether the statute of New York, of 1876, as amended in 1877, relating to Insurance Companies transacting the business of collecting premiums in the State of New York, apply to the policy of insurance in this case, which was delivered and first became effective in the Territory of Washington, where at the time of delivery the first premium was paid.

Second.—Whether, if the said policy having been delivered and becoming binding in the Territory, now State, of Washington as a contract was as to premium notices to be controlled by the statute of the State of New York.

Third.—Whether, the first premium having been paid, and the policy having been delivered in the State of Washington, and the insured having at that time and until his death, his residence and post office address in the State of Washington, and having no post office address in the State of New York, the premium notice statute of New York could have any application to the contract of insurance.

Fourth.—Whether the following provision in the application for insurance,

> "And it is agreed there shall be no contract of insurance until the policy shall have been issued and delivered by said Company, and the first premium thereon paid, while the person proposed for insurance is in the same condition of health described in this application; and if said policy be issued, the declarations, agreements and warranties herein contained shall be a part thereof; and the contract of insurance when made shall be held and construed at all times and places to have been made in the City of New York,"

when considered along with other parts of the application and policy, and especially the following printed upon said application, "SPECIAL NOTICE TO APPLICANTS AND POLICY HOLDERS. * * *

> "*Policy holders must not expect to be notified when their premiums will be due.* It is a practice of the Company to send these notices as reminders, when the address is known, but no responsibility is assumed on the part of the Company in consequence of their non-reception",

and the following provision in the policy,

> "Each premium is due and payable at the home office of the Company in the City of New York; but *will be accepted elsewhere when duly made in exchange for the Company's receipt signed by the President or Secretary. Notice* that each and every such payment is due at the date named in the policy, is given and accepted by the delivery and acceptance of this policy, *and any further notice required by any statute is thereby expressly waived*"

subjects your petitioner to compliance with the statute of New York relative to mailing premium notices, notwithstanding the fact that said policy was delivered when the first annual premium was paid in the terri-

tory of Washington, and notwithstanding the fact that the post office address of said insured was at all times during his life in the State of Washington, and that during all such times he had no post office address in the State of New York.

Fifth.—Whether your petitioner, being a Mutual Life Association, whose membership is composed of its premium paying policy holders, can be compelled to pay the death loss, although but a single annual premium had been paid on the policy upon its delivery in the territory of Washington, April 29, 1886, and no payment or offer of payment of the premiums falling due in April, 1887, 1888, 1889 and 1890 was made by or on behalf of the insured in his life time, or offered to be made by or on behalf of any of his beneficiaries.

Sixth.—Whether upon the facts stated in the last proposition, the action is not in the nature of specific performance, and whether plaintiffs bringing this suit are not estopped by reason of failure of performance of the contract upon their part and that of the insured from seeking a recovery from the members of the Association who have by the payment of premiums created a fund out of which plaintiffs in the Trial Court are seeking contribution in the payment of the death loss provided for in this policy.

Seventh.—Whether, by reason of the admission that before a second annual premium had been paid upon the policy, and the undisputed testimony that at the time the second annual premium fell due, the local agent of the Company, having repeatedly presented the renewal receipt to the insured, George Dana Hill, Seattle, Washington, and requested payment, and the said Hill having been informed of the amount of the premium and having

been offered in exchange for its payment such renewal receipt, but failing and declining to make payment of the same, the policy was not abandoned and terminated; and further, whether the Company was not thereby warranted to treat the policy as terminated, and so enter it as it did upon its books, and whether if the policy was thus terminated and abandoned, the beneficiaries are not bound.

Eighth.—Whether the refusal of the insured, George Dana Hill, to make payment of the second annual premium, as is shown by the undisputed testimony, and continuing in such refusal until his death in December, 1890, is not the refusal of the beneficiaries.

Ninth.—Whether the Insurance Company was required to make demand of payment from the beneficiaries, who from the date of the insurance until the death of George Dana Hill, were his infant children of tender age, left in his home at Seattle, under his parental care and keeping.

Tenth.—Whether, for the purposes connected with the payment of premiums, the insured, George Dana Hill, was not the agent of the beneficiaries in all matters relating to the payment of premiums, and notice thereof, and whether they were not bound by his acts and conduct in relation thereto.

Eleventh.—Whether the premium notice laws of the State of New York enter into this contract of insurance so as to control the business of collecting premiums on the policy in the face of the specific stipulation of the parties in the policy that no notice other than the policy itself provides, shall be given, any statute to the contrary notwithstanding.

VI.

Specification of Errors.

The following are the errors assigned by the plaintiff-in error, and upon which it relies for the reversal of the cause:

1. Upon the conclusion of the testimony, and prior to the argument of counsel to the jury, and prior to the charge of the court to the jury, the defendant requested the court to instruct the jury upon the whole case, and upon all the evidence, to render a verdict in its favor, which request was refused (Rec., p. 173).

2. Error in refusing to grant defendant's motion to instruct the jury to return a verdict in its favor (Rec., pp. 174, 175).

(*a.*) Because issue was joined as to whether the contract of insurance was a New York or a Washington contract, and the evidence showed the first annual premium was paid in exchange for the delivery of the policy of insurance at Seattle, Washington, and the contract came into being in the State of Washington.

(*b.*) Issue was made whether the conditions of the policy were performed on the part of the insured, entitling a recovery, and there was no proof tending to show that any premium whatever save the first annual premium had ever been paid or offered to be paid.

(*c.*) Because it is admitted in the pleadings and stipulated by the parties that the residence of the insured, George Dana Hill, from the time of the application for the policy in April, 1886, down to his death, December 4, 1890, was at Seattle, Washington, and that during all of that time the residence and postoffice address of the insured was at Seattle, Washington, and that he had

no residence or postoffice address in the State of New York.

(*d.*) Because it was shown that the policy was actually delivered and the first premium was paid at Seattle, Washington, and there the policy became a contract, and because the policy expressly provides that no notice whatsoever should be given of the due date of any premium, and because the application placed by the applicant with the company contains a notice and warning that no notice is to be given of when the premiums should become due upon the policy, if entered into. The application was accompanied with a form of policy as it was to be issued, expressly providing that no notice whatever of the due date of premiums should be given, any statute to the contrary notwithstanding.

(*e.*) Because it was shown and not contradicted that at the time the second annual premium of April 29, 1887, became due, the agent of the insurance company in Washington being in possession of the renewal receipt applied to the insured to make payment of the premium then due, in exchange for the receipt at the City of Seattle, and the insured failed to do so because not in funds, and for other reasons, and the company again placed the renewal receipt in the hands of its Seattle agent, who again called upon the insured to make payment of the premium, when he failed and declined to do so, and the renewal receipt was returned to the company because of such failure and declination to make payment.

(*f.*) Because it is admitted in the pleadings that none of the plaintiffs ever paid any premium, or caused any premium to be paid after the one of April 29, 1886, claiming they were not called upon to do so except upon notice served upon *them* under the statute of New York

(*g.*) Because in the whole transaction of insurance, so far as dealing with premiums is concerned, and meet-

ing the conditions of the policy, the insured George D. Hill acted for all the beneficiaries, and notice to him and knowledge on his part, and failure and omission on his part was notice, knowledge and failure on the part of the plaintiffs in the case, and they cannot have the benefit of the policy of insurance upon the life of George Dana Hill without ratifying his conduct, and being controlled and governed by his conduct in the premises, and whatever would bind or estop him from terminating the contract, so far as he was concerned, had the same effect upon them.

(*h.*) Because in this case it is proven that the defendant insurance company is a mutual life association, whose membership consists of its persistent policy-holders, and the burden of paying losses falls upon the persistent policy-holders or contract-performing members of the company, and that in this case there were four consecutive years allowed to pass without the payment of any premium or part of a premium, and for that reason plaintiffs cannot recover from the defendant company, or the other members of the association, upon a policy which had remained in default for a period of four years.

(*i.*) *Because if the statute of New York regarding premium notice in any manner affected the policy of insurance in this case and the question of the due date of premiums, it could do so only by the convention of the parties, and not by operation of law, and the parties have agreed that the statute shall not apply to the policy.*

(*j.*) Because the case as made by the plaintiffs rests upon plaintiffs' compliance with the terms and conditions of the policy of insurance, and not upon any failure of the defendant to comply with the statute of

New York relative to the giving of notice of the due date of premium, the allegation of performance of conditions having been entirely disproved.

(*k.*) Because there is a variance between the case pleaded and the case relied upon by the plaintiffs in departing from a contract of insurance.

(*l.*) Because the notice under the statute of New York and the statute itself has reference to the forfeiture of premiums already paid on the policy. and the advantages accruing therefrom, or the reserves thereon, and to nothing else, and that such were the only things capable of forfeiture (Rec., pp. 174, 175).

3. Refusal of the court to give defendant's requested instruction No. 1 as follows:

"I.

"The court instructs the jury as a matter of fact the contract of insurance sued on did not become an existing contract until it was delivered to the insured George D. Hill at Seattle, Washington, when and where the first annual premium was paid, but it was, at the time when this contract came into being, agreed by and between the parties that it should be construed to be made in New York City, but it was at the same time agreed between the contracting parties that no statute, whether of New York or elsewhere, should require any notice to be given of when any premium on the policy fell due, but that the policy itself afforded the notice and all the notice of the date at which the premiums fell due, to wit, on the 29th day of April, 1887, and the same day of each succeeding year during the continuance of the policy, and if not so paid the policy should terminate and become void. It is denied by the answer that any part of the premium falling due April 29th, 1887, was ever paid. If this premium was not paid, then the policy became forfeited and ended, and the plaintiffs have no right to recover.

The Court instructs you there is no evidence before you that this premium falling due April 29th, 1887, or any part of it, or any subsequent premium, was ever paid, but on the contrary, the evidence is that such premium was not paid" (Record, p. 176; see also p. 156).

4. Refusal of the Court to give defendant's requested instruction No. II as follows:

"II.

"The plaintiffs in this case admit that aside from the first premium paid in 1886 upon the delivery of the policy none of them have ever paid any premium upon this policy. The answer denies that any premium save the first upon the delivery of the policy was ever paid by anyone. The Court instructs you there is no evidence in the case tending to show that any premium, save the first annual premium paid upon the delivery of the policy, ever has been paid, while, on the contrary, there is evidence tending to show that no such premium has ever been paid, and upon this state of facts you should render a verdict in favor of the defendant" (Record, p. 177; see also p. 158).

5. Refusal of the Court to give defendant's requested instruction No. III as follows:

"III.

"The Court instructs you there is no evidence in this case tending to show that the insured George D. Hill, at any time from the time of making his application for the policy sued on in April, 1886, to his death, December 4, 1890, had any post office address in the State of New York, but on the contrary, it is stipulated and agreed by the parties that during all of that time his post office address was at the City of Seattle, in the State of Washington. The Court instructs you as a matter of law that the defendant was not required by any statute of the

State of New York or elsewhere to serve a notice of the date when the premium became due upon the insured George D. Hill, except he had a post office address in the State of New York, and as the Court has advised you, there is no evidence that he had a post office address in the State of New York, or anywhere, save in the City of Seattle, State of Washington" (Record, p. 177).

6. Refusal of the Court to give defendant's requested instruction No. IV as follows:

"IV.

"The Court instructs you that if the insured George D. Hill failed to pay the premiums on the policy sued upon, falling due on the 29th day of April, 1887, the 29th day of April, 1888, the 29th day of April, 1889, and the 29th day of April, 1890, then he abandoned the contract and the same became terminated, and there would be no right on the part of these plaintiffs to recover, and your verdict in such case should be in favor of the defendant. The Court instructs you that there is no evidence tending to show that said George D Hill, or anyone, paid any of the premiums for any or all of these four years, but there is evidence tending to show that he did not, and that such premiums were not paid" (Record, p. 178; see also p. 159).

7. Refusal of the Court to give defendant's requested instruction No. V and Va. as follows:

"V.

"The Court instructs you that the plaintiffs in this case rely for their recovery upon the performance of the conditions on their part, or that of the insured, as the ground of their right to recover, and that one of the conditions upon which such right of recovery rests is that the premiums falling due on the 29th day of April, 1887, and on that day of each succeeding year dur-

ing the life of said Hill, which ended December 4, 1890, were paid. The Court further instructs you that there is no evidence tending to show that anof said premiums were ever paid, or caused to paid, and under the case as made by plaintiffs, recovery cannot be had for failure on the part of the insurance company to comply with any statute of the State of New York relative to giving notice as to when the premium or premiums fell due To allow the plaintiffs to recover because of failure to give notice under the statute of New York would be what in law is termed a departure in pleading which cannot be permitted.

V. A. The Court instructs you that in matters relating to the payment of premiums upon this policy the insured George D. Hill was the agent or trustee of the plaintiffs, with full power to bind them in that respect, and any failure, omission or act on his part to make payment of premium or premiums as the same became due, became their failure, omission or act" (Record, p. 178, see also p. 161.)

8. Refusal of the Court to give defendant's requested instruction No. VI as follows:

"VI.

"The Court instructs you that the defendant in this case is a mutual life insurance company or association, whose membership consists of what in law is known as its 'persistent policy holders', that is, the policy holders of the company keeping up their policies by the payment of premiums as falling due, and if you find that the premiums on the policy in suit falling due April 29, 1887, 1888, 1889 and 1890 were not paid and have not been paid, and the Court further instructs you that there is no evidence that any of the same have been paid, then the Court instructs you your verdict should be in favor of the defendant" (Record, p. 179, see also p. 162).

9. Refusal of the Court to give defendant's requested instruction No VII as follows:

"VII.

"The Court instructs you there is no statute of New York, nor any law, requiring or directing the defendant insurance company to give any notice to any of the plaintiffs in this case as to when premium upon the policy sued upon became due. Plaintiffs had the right, however, by virtue of their interest in the policy, to have paid any premium at the time it fell due, and the defendant would have been bound to accept it. It would have been the duty of the plaintiffs, or any of them, to have made tender of the amount of the premium at the time it fell due, to the company or some of its authorized agents. There is no proof, however, that any such tender was made, but upon the contrary, the pleadings admit that none of the plaintiffs ever did pay or cause to be paid any such premiums" (Rec. 180).

10. Refusal of the Court to give defendant's requested instruction No. VIII as follows:

"VIII.

"Upon all the evidence in the case, gentlemen of the jury, the Court instructs you to find a verdict in favor of the defendant" (Rec., 181).

11. Error of the Court in giving the following instruction:

"Now, a refusal implies an affirmative act with knowledge and with an opportunity to act. It is not synonymous with omission; a mere omission to pay the premiums has no such effect, but the defense that is interposed here is that these plaintiffs with knowledge, that the premiums were due and were unpaid, refused to pay them, and that is the question which I

submit for you to decide, whether the evidence proves that there was any such affirmative act on the part of the plaintiff in this case as would amount to a refusal to pay the premiums, or whether there was any expressed contract or agreement since the delivery of the policy, which amounts to an agreement on their part to surrender the policy or abrogate the contract" (Rec., 181).

12. Error of the Court in giving the following instruction :

"There is another question which I submit to the jury, and that is, whether Captain Hill himself, whose life was insured, abrogated this contract by any agreement on his part to surrender or avoid it. He was not the agent or the trustee of the plaintiffs, and his act would not be an equivalent to their act, but the contract was made by him, and his failure to pay the premium, if it was known to the plaintiffs and was acquiesced in by them and ratified by them, would be an abrogation of the contract. His act, not especially authorized or ratified, would not have that effect" (Rec., 182).

13. Error in giving the following instruction :

"If you find from the evidence that there was any affirmative act on the part of these plaintiffs or any act of their father, that was approved and ratified by them, which abrogated this contract in any way, your verdict would be for the defendant. If there was no such subsequent abrogation of the contract, your verdict would be for the plaintiff and you will return a verdict in favor of the plaintiffs in the sum of twenty-nine thousand and twenty dollars" (Rec., 182).

14. Error in refusing to sustain defendant's motion for a new trial on the ground that the verdict was contrary to the law and the evidence (Rec., 182).

15. Error on the part of the Court in refusing to sus-

tain defendant's motion for judgment in its favor, notwithstanding the verdict returned in the cause (Rec., 183).

BRIEF OF THE ARGUMENT.

POINT I.

The rulings by the Trial Court which were affirmed by the Circuit Court of Appeals were based upon the theory that the Trial Court under the mandate of this Court could only consider the question of the legal effect of the conduct of the plaintiffs themselves, and that this Court had decided that in the Hill case the New York Statute governed. This was clearly erroneous.

This company aims as far as possible, except in cases of fraud, to do business on the principle laid down by Judge Caldwell of the United States Circuit Court, namely, that if the Company has the insured's money and the insured has the Company's policy, the Company should pay. In this case and in others of the same "cluster", as Judge Hanford puts it, the insured has the Company's policy, but the Company has not the insured's money. The doctrine of the Supreme Court of the United States is that the local New York premium notice statutes do not operate extraterritorially, on the vast business done by New York Companies outside that State, and throughout the world, and that

technical construction of statutes cannot be substituted for the payment of premiums.

If the principles and doctrines which the Supreme Court decisions have established are enforced in their full spirit and intent, there will be no difficulty in disposing of this case or any other similar cases. They were not so enforced in this case in the Court below, so that the time of this Court must be taken in demonstrating that the propositions hereinafter contended for are in full accord with the doctrines of this Court.

The litigation in the Phinney, Allen, Sears & Cohen cases has all terminated.

There are substantially only two main points in this case, and in both of these the Court below erred. The first is that the New York statute did not operate extraterritorially on the business of collecting premiums in Washington, for so the Supreme Court decided in the Cohen case.

The second is that Judge Hanford decided wrongly that the children's interests were not affected by the default of Hill in not paying the premium.

In no part of the record is there any reasoning by the courts below, or any legal authority cited by them, in support of this last proposition.

The moment that it is pointed out that the *statute has no concern with notice to beneficiaries themselves. all basis for the contention that they are not affected by default of Hill completely fails.*

In the Hathaway case (Hathaway *v.* Mutual Life, 106 Federal Reporter, 815, and 45 C. C. A., 42), the Circuit Court appeals followed the Cohen Case in the 179 U. S. See also Johnson *v.* Mutual Life, 180 Mass., 407 ; Atty. Genl. *v.* Netherlands Fire, 181 Mass., 522.

The facts in the Hill case are precisely the same as in the Hathaway case, except as to an irrelevant clause in the Hill policy, hereinafter discussed, about where

the policy is to be construed as made. In the Hathaway case the Court, through District Judge HAWLEY, stated as follows:

"From the foregoing statement, it will readily be seen that the facts, as well as the legal principles involved herein, are substantially the same as were presented to the Supreme Court in Insurance Co. *v.* Cohen, 179 U. S., 262 * * * The Court, after a review of several authorities, came to the conclusion 'that the statute of the State of New York does not, under the circumstances presented, control, and that the rights of the parties are measured alone by the terms of the contract. The insured having failed to pay the premium for years before his death, the policy was forfeited.' Upon the authority of that case the judgment of the Circuit Court is reversed and cause remanded for a new trial."

The Court below in this case laid too much stress on the obiter remark of the Supreme Court of the United States about no reference in the pleadings to Mrs. Cohen. This Court in this case had already stated that it was an interesting question what was the effect of Hill's failure, but in the Cohen case as they held the statute inapplicable, there was no occasion to enquire into the effect of Cohen's failure. But in this case, also, there is no real occasion to enquire into the effect of Hill's failure, for the statute does not govern any more than it did in the Cohen case.

This case does not disclose anything more than a purely speculative claim. It was started five years after Hill died, on the basis of the old Phinney case before that case was decided by this Court. Hill paid one premium in 1886, then abandoned the policy in 1887, and lived some three years afterwards, during which time neither he nor the children nor anyone in their behalf paid any

attention to the policy. The plaintiff, Ellen Kellogg Hill discloses the real speculative situation in the following questions and answers (Record, page 86).

Q. Miss Hill, when did you first become aware of the existence of the policy sued upon here? A. Well, I am not sure what time, but it was not until it was put in the hands—until it was made a suit.

Q. You were not aware until after the suit? A. Not until after the suit was begun.

Both the above points are taken up in detail hereinafter.

THE OPINIONS OF THE COURT BELOW AND OF THE TRIAL JUDGE ON MOTION FOR JUDGMENT IN FAVOR OF THE DEFENDANT *non-obstante veredicto*, SHOW A MISCONCEPTION OF THE RULINGS OF THIS COURT.

THERE IS NO "LAW OF THE CASE" WHICH PREVENTS THE COURT FROM EXAMINING THE WHOLE RECORD, AND CONSIDERING WHETHER THE NEW YORK STATUTE GOVERNS.

Judge Hanford's opinion (p. 53), is a complete misapprehension of the effect of the decisions in this Court, and practically ignores the law as laid down in the Cohen case, 179 U. S., 263, *which was decided by this court after it had decided the Hill case.*

The learned Judge claims that the only issue under the mandate of the Supreme Court re-opened for adjudication was the issue as to the conduct of the plaintiffs themselves and its legal effect.

The Circuit Court of Appeals, it is true, refers to the abandonment point, and then says (page 202 of Record) that the case was sent back to the Circuit Court for trial on this question alone, and further says that the decision of this Court—that is, the decision of the Court

of Appeals upon the other points not having been criticised or reversed by the Supreme Court—was then the law of the case for the Court of Appeals. The Circuit Court of Appeals, on the first hearing before it, held that the Hill contract was governed by the statute of the State of New York, 97 Fed. 267.

It can be readily demonstrated, as we do below, that the Supreme Court of the United States assumed the contract to be governed by the law of New York, without discussing or deciding the question. The Supreme Court of the United States is not required by the Constitution or laws, and that is true of the Appellate Courts in some of the States, to pass upon all questions that are presented. As a matter of practice, they ordinarily do not pass upon any more questions than are absolutely necessary for the determination of a particular case; and, where the decision of one question upon a re-trial may dispose of the entire case, it is the common practice of the Supreme Court to do as it did in this and the Phinney case. The demurrer had admitted the affirmative defense in which the company pleaded that both the insured and the beneficiaries, including the plaintiffs, had failed, neglected and refused to pay the second premium. If these facts were true, it constituted in the opinion of this Court a complete defense to the action on the policy. A demurrer to this defense was thus sustained in the Circuit Court of Appeals, but this Court overruled the demurrer and the only question *actually* decided by the Supreme Court was that a good defense was pleaded. It was fair, therefore, for this Court to assume that the case would be disposed of upon this issue of fact, and hence that it was unnecessary for them to determine the principal or primary questions of law presented in the case.

As a matter of fact, however, the Circuit Court of

Appeals, on the hearing below on the last appeal, did consider fully the question whether under the Cohen case the contract was governed by the law of New York, and erroneously held that it was. It remains for us to show in detail that the question whether the Hill contract was governed by the New York law or not is one open to discussion and decision at this time by this Court.

Their error is shown by an examination of The Mutual Life *vs.* Hill, 178 U. S., 347. Mr. Justice BREWER says: "This case resembles the last two decided," that is, the Sears case and the Phinney case. Then Justice BREWER says: "Here, as in the last two cases (that is, in the Sears and Phinney cases), is disclosed a distinct agreement on the part of the insured and the Company to waive and abandon the policy and all rights and obligations on the part of the parties thereto." The Hill case, therefore, is on the same footing as the Phinney and Sears cases. The final disposition of the Hill case by the Supreme Court was as follows:

> "Under those circumstances we think the case
> "falls within the same rule as the preceding; and
> "the judgments of the Court of Appeals of the
> "Ninth Circuit and of the Circuit Court of the
> "United States for the District of Washington
> "are reversed, and the case remanded to the latter
> "Court, with instructions to overrule the demurrer
> "to defendant's answer."

That is, after the mandate came down, the case stood in the same position as if Judge Hanford had on the 18th day of January, 1899, overruled the plaintiff's demurrer to the answer instead of sustaining it. Every single issue of fact and law which would have been in this case had Judge Hanford originally overruled the

defendant's demurrer was presented when this case came on for trial the last time, subject only to the controlling effect in this Court of the decisions in the Supreme Court of the United States in 178 and 179 U. S., and except that there was an amended answer. There is absolutely no warrant for maintaining that the only issue which under the mandate of the Supreme Court was re-opened for adjudication in the Circuit Court was the issue as to the conduct of the plaintiffs.

Following the lead of Mr. Justice BREWER and turning back to the Sears case, 178 U. S., 345, the statement of Mr. Justice BREWER there is, "In view of what has already been decided in Mutual Life Insurance Company *vs.* Phinney, executrix, *ante*, 327, it is needless to do more than note the fact that, as shown by the answer, after the insured had once defaulted, etc.." and Mr. Justice BREWER further said, "As we held in the prior case (that is the Phinney case) there is nothing in the New York Statute (*if controlling at all*) to prevent the parties from dealing with that as any other contract, and if they chose to abandon it, their action is conclusive," and the disposition by the Court was as follows:

> "The judgments of the Court of Appeals of the "Ninth Circuit and of the Circuit Court of the "United States for Washington are reversed and "the case remanded to the latter Court, with in-"structions to overrule the demurrer to defend-"ant's answer."

Following again the lead of Mr. Justice BREWER and turning back to Mutual Life *vs.* Phinney, 178 U. S., 327, at pages 337 and 338, this Court states fully our contention that the Statute of New York does not operate extra-territorially and then says: "We are

not insensible of the importance as well as the difficulty of the question thus presented in these various aspects, *but think that the case may properly be disposed of without any consideration or determination thereof. We shall assume, without deciding, that the law of New York does control in respect to this contract*, and still are of the opinion that the judgment must be reversed for error occurring on the trial. On page 344, Mr. Justice BREWER says:

> "But it is a very different question whether the "Executrix of the insured, after his long delin- "quency in the payment of premiums, can enforce "the contract as against the other insured parties, "thereby diminishing their interest in the accumu- "lated reserve. Ordinarily no one can enforce a "contract unless on his part he performs the stipu- "lated promise, and it may be that this rule is "operative in this case. We do not care to decide "the question, and only mention it for fear that it "should be assumed we had overlooked it. It is a "question which may never arise in the future liti- "gation of this case, and until it necessarily arises "we do not feel called upon to decide it."

The final disposition of the Phinney case is thus stated by Mr. Justice BREWER:

> "For these reasons the judgments of the Court of "Appeals of the Ninth Circuit and of the Circuit "Court of the United States for the District of "Washington are reversed, and the case remanded "to the latter court with instructions to award a "new trial."

Consequently, in the Hill case this Court assumed, "without deciding," that the law of New York controlled.

It is apparent, therefore, that the Hill case was before the Court below for trial on all the issues involved, the Court being controlled by the doctrine stated in the Phinney, Sears and Hill cases to which we refer and also by the doctrine in the Cohen case to which we will refer.

The Hill and Sears cases were argued in March, 1900, and decided in May, 1900. At the same time there was argued the Cohen case, reported in 179 U. S., 262. Although this case was argued at the same time, viz., March, 1900, it was not decided until September, 1900.

In this Cohen case Mr. Justice BREWER states as follows:

> "Mutual Life Insurance Company *v.* Phinney, 178 "U. S., 327, was an action against the same insur- "ance company, in the same district, on a policy "like the one in controversy here, save that in that "the insured was himself the beneficiary, * * * "In the opinion we referred to the fact that there "was a primary question of the applicability of a "statute of the State of New York, but deemed it "unnecessary to decide it. That decision was fol- "lowed by the cases of the same company against "Sears, 173 U. S., 345; against Hill, 178 U. S., 347; "against Allen, 178 U. S., 351. *All of which cases "were disposed of in like manner.*"

And then the Court went on to say that the primary question noticed but not decided in those cases was presented in the Cohen case.

The Court then went on to hold, "In accordance with the claim of defendant, made in this case, the statute of the State of New York did not operate extra-territorially."

The Court ends its opinion by saying: "We conclude, therefore, that the statute of the State of New York does not under the circumstances presented con-

trol, and that the rights of the parties are measured alone by the terms of the contract. The insured having failed to pay the premium for years before his death, the policy was forfeited," and the final disposition of the case to be as follows:

> "The judgment of the Circuit Court of Appeals
> "will be reversed and the case remanded to the
> "Circuit Court of the United States for the Dis-
> "trict of Washington, with instructions to set
> "aside the judgment and overrule the demurrer."

Upon the second trial herein Judge Hanford held that the only issue for determination was the one presented by the defense of waiver and abandonment which was submitted to a jury and the verdict was against the Company. On denying motion for judgment *non obstante veredicto*, HANFORD, J., said: "After a great "deal of deliberation I feel constrained to hold that as "the main questions above outlined were fully con- "sidered by this Court and by the Circuit Court of "Appeals and decided in favor of the plantiffs, and as "the decisions of these questions are left undisturbed by "the Supreme Court, they must now be regarded as the "law of this case."

We have shown that the scope of the decisions by this Court was not as claimed by the plaintiff. Besides, this Court is not limited.

As Mr. Justice BROWN said in the case of the Panama Railroad against The Napier Shipping Company, 166 U. S., 284: "That while the Court of Appeals may have "been limited on the second appeal to questions arising "upon the amount of damages no such limitation ap- "plies to this court, when, in the exercise of its super- "visory jurisdiction, it issues a writ of certiorari to "bring up the whole record. Upon such writ the entire "case is before us for examination."

We are not, of course, claiming that it is not the settled law of this Court that whatever has been decided on one appeal or writ of error cannot be re-examined on a second appeal or writ of error brought in the same suit, and that the first decision has not become, as far as it goes, the settled law of the case (as per rule stated by Mr. Justice Brewer in Thompson *vs.* Maxwell, 168 U. S., 456).

There is also a different rule touching the law of the case when applied to a judgment upon demurrer as distinguished from one upon pleadings and proof (see Mr. Justice Brown's opinion in Wiggins Ferry Company *vs.* R. R., 142 U. S., 410). This rule of the law of the case may also only be invoked as to questions which have necessarily been actually decided, but does not apply to suggestions on the part of the Appellate Court which may be applicable upon a new trial.

See Patillo *vs.* Commission Co., 108 Federal, 729, where the Court says: "While the rule that an adjudica-
" tion by an Appellate becomes the law of the particular
" case on all subsequent trials is a wholesome rule, and
" one that should be enforced, yet the rule should be
" confined to questions that where actually considered
" and decided and it should not be extended so as to
" embrace dicta or intimations contained in an opinion
" which may be thought to foreshadow the views of the
" Appellate Court on other questions."

Applying this rule, the decision of this Court in this case as governing further proceedings, is only the law to the extent that the demurrer was improperly sustained. In passing upon the sufficiency of the pleadings the practice is almost universal with the Appellate Tribunals to limit their decisions to the determination of the issues of law so presented. No inference such as was indulged in by Judge Hanford, is justified.

It is perfectly apparent, therefore, from what we

have said above, that the Courts below were clearly in error in not applying to the trial and decision of the issues of fact and law in this case, the doctrine laid down in The Mutual Life *vs.* Cohen, 179 U. S., 262, and in claiming that under the mandate of the Supreme Court of the United States they could only consider the question of the legal effect of the conduct of the plaintiffs themselves, although as a matter of fact, the Circuit Court of Appeals did consider the Cohen case.

POINT II.

The premium notice statute of New York does not under the circumstances presented control, and the rights of the parties are measured alone by the terms of the contract. The premium, falling due in 1887 not having been paid, the insurance, $20,000, is not collectible (Cohen case, 179 U. S., 270).

We have shown in Point I that this Court assumed "without deciding" that the statute controlled in the hearing of the Phinney, Hill Allen & Sears cases, on demurrers, but in the subsequent Cohen case held it had no extra territorial operation.

The Hill policy was a Washington contract under the decision in the Cohen case, just as the Cohen contract was a Montana contract, and as the New York statute has no extra territorial application, it did not govern the collection of premiums in Washington, Hill like

Cohen having no residence or post office address in the State of New York.

This Court in the Cohen case has decided that the statute was intended to have no operation beyond the State of New York. In addition to the reasons given of the local and mere regulating nature of the statute, this Court calls attention to a number of its features as indicating both that it was not intended to so operate, but in the nature of things could not have an extra territorial effect. The Court says:

> "Again, the terms of the act itself tend in the same direction. It provides for a 30 day notice. While such a notice might be reasonable as to all policies within the State, yet when it is remembered that some, at least, of the New York insurance companies are doing business in all quarters of the globe, it is obvious that a 30-day notice in many cases would be of little value."
>
> "Further, by Section 2 the statute provides that an affidavit by one authorized to mail the notice shall be 'presumptive evidence' of the giving of the notice. Can it be supposed that the Legislature of New York was contemplating a rule of evidence to be enforced in every State and nation in the world?"
>
> "These considerations lead to the conclusion that the statute of New York, directed as it is to companies doing business within the State, was intended to be and is, in fact, applicable only to business transacted within that state." (p. 266-7.)

In this case the fact is unquestioned that George Dana Hill, the insured, from the date of his application in April, 1886, to that of his death, December 4, 1890, resided in and was a citizen of Seattle, Washington. Such was his residence and post-office address at the time of the application and the issue of the policy. His application stated that no

change of residence or post-office address was contemplated by him. It is agreed that throughout this entire time his residence and post-office address was at Seattle, Washington, and that he had no residence or post office address in the State of New York. There is no dispute of the fact that the policy was delivered and the first annual premium paid at Seattle, Washington.

In Mr. Warburton's brief on the application for the writ in this case he says: "The application in the Hill "policy contained the agreement that it was made sub- "ject to the charter of the company and to the laws of "New York. *This is the identical provision in the "Cohen case, and if this were all there was in the Hill "contract tending to show it was the intention of the "parties to make it a New York contract, we would ad- "mit that the Cohen case was against us on this point. "But this is not all.*"

The only point then made by the plaintiff to differentiate the Hill case from the Cohen case, so far as the operation of the New York statute is concerned, is that the Hill application contained the clause as follows:

"And it is agreed that there shall be no contract of insurance until a policy shall have been issued and delivered by the said company, and the first premium thereon paid while the person proposed for insurance is in the same condition of health prescribed in this application; and if said policy be issued, the declarations, agreements and warranties herein contained shall be a part thereof; and the contract of insurance when made shall be held and construed at all times and places to have been made in the City of New York."

This special clause was not intended to and did not put the New York premium notice Statute in operation in Washington, so as to govern the collection of the Hill premiums there and this clearly appears from the following considerations:

(1.) *There is no express reference in the policy to, or incorporation therein of any premium notice statute as governing the parties except to waive it.*

(2.) *Such an intent to make the New York premium notice statute govern would be inconsistent with the clause in the policy expressly waiving any statutory notice.*

(3) *The claim of the plaintiffs involves the finding of an express intent to make the New York statute which has no extra territorial operation, operate extra territorially, by agreement, the effect of which would be to change the statute by agreement. This intent is baseless and unreasonable. The statute is drawn with reference to New York business alone.*

(4) *The Baxter application and policy were not similar to the Hill application and policy* since the special clause in the Baxter policy had the words therein "*and to be executed*" and the application and policy were otherwise different, also.

(5) *The special clause covers primarily any laws of New York as to declarations, agreements and warranties in the application, and the legal situation is the same in this respect as in the Cohen case.*

(6) *Even if the policy had been actually made in the City of New York the notice statute would not have operated upon the business of collecting its premiums in the State of Washington, even if also it had not been waived.*

(1) *There is no express reference in the policy to or any incorporation therein of any premium notice statute as governing the parties except to waive it.*

The language in the application is, "Application to " the Mutual Life Insurance Company of New York for

"a five-year distribution policy subject to the charter "of said Company and the laws of said State."

The application also contains the clause above referred to, namely, "and that if said policy be issued, "the declarations and agreements and warranties herein "contained shall be a part thereof and the contract of "insurance when made shall be held and construed at "all times and places to have been made in the City of "New York."

This language does not *expressly* refer to any particular statute in the State of New York. The fastening of any particular law to the contract as governing the actions of the parties thereunder, is entirely inferential.

In the policy the amount is payable to the wife, "if living in conformity with *the statute*." The statute there referred to is the statute of NewYork relating to a Married Woman's policy such as this.

According to the decision in the Supreme Court in the Cohen case it was held that the Legislature never intended that the statute should operate extra-territorially. The parties themselves have not by any agreement or convention in the application or policy *expressly agreed* that the New York notice statute should govern. It is, indeed, true that this Court in the Cohen case said :

"It is not doubted that a contract by an insurance "company of New York, executed elsewhere, might by "its terms incorporate the laws of New York and make "its provisions controlling upon both the insured and "the insurer."

This is true, but this contract did not by its terms incorporate this premium notice law of New York and did not by its terms make its provisions controlling upon both the insured and the insurer. On the contrary it waived them.

The language expresses the intent of the parties that the contract when made should be held and construed to have been made in New York City, but it expresses no intent as to what particular statutes, if any, of New York State shall control the actions of the parties therein. The language is satisfied and fed by the suggestion that it was intended to incorporate into the policy the Married Woman's Acts. The contention of the plaintiffs, therefore, is inferential merely and their inference is clearly untenable. Had it been the intent of the parties that the New York premium notice statute should be controlling, it would have been an easy matter to have so provided in the contract. They could have stipulated expressly in regard to notice that the contract was to be governed by the statute of the State of New York, on the contrary they stipulated expressly that no such statutory notice should be given or required, and the effect of this waiver will be considered hereafter.

(2.) *Such an intent to make the premium notice statute govern would be inconsistent with the clause in the policy expressly waiving any statutory notice.*

In addition to the clauses contained in the *application* for the policy referred to in (1) above, the *policy and application* contain the following clauses which are of vital importance in this case:

"Notice that each and every such payment is due at "the date named in the policy, is given and accepted "by the delivery and acceptance of this policy, and "any other notice *required by any statute*, is hereby "expressly waived" (Record, page 78).

This clause is binding of course on Hill's children.

In the application also as a special notice to applicants and policyholders there was the following clause:

"Policyholders must not expect to be notified when "their premiums will be due. It is the practice of the "company to send this notice as a reminder when the "address is known, but no responsibility is assumed on "the part of the Company on account of their non-re-"ception" (Record, page 75).

These clauses are absolutely inconsistent with the claim that it was the *intent* of the parties that the New York statute should control their actions in respect to notices.

That is, assuming that the general language of the the special clause in question related to anything except matters connected with the application and married woman's act, there being in the clause no express reference to any particular statute of New York, it is entirely consistent with such clause that other parts of application or policy *could except any particular statute of New York* from the operation of the clause. It is clear, therefore, that the clause was not intended to cover the premium notice statute because of the above provisions in regard to notice and waiver.

As the claim made can be only that the statute operates by agreement or convention of Hill and the company, no question can come up, of course, as to the ability of Hill to waive by convention the operation of such statute. For it is the *convention* of Hill and the company, expressed in the special clause, on which Mr. Warburton wholly relies. It was not neces-sary for the Supreme Court of the United States to go into this question, because the Statute was held not applicable, and the special clause peculiar to the Hill case was not in the prior cases, making this argument therefore irrelevant therein, yet we think that the validity of the waiver, even in a case where the statute would be otherwise applicable, was necessarily involved in the statement of the Supreme Court in the Sears case,

"that there was nothing in the New York statute (if controlling at all) to prevent the parties from dealing with that as with any other contract."

It is perfectly clear that the contract between the parties was that the company should be under no obligation to send any notice, either statutory or otherwise. This contention, therefore, stated in (2), is absolutely destructive of the plaintiff's position.

The inference of the plaintiff is overcome by the above expressly specified mutual agreement. The parties by convention have not only not failed to incorporate the premium notice statute in the policy but have incorporated into it a stipulation directly the opposite to the statute so far as notice of due dates of premiums is concerned. The plaintiffs' deduction—a contention based solely on inference—can only arise where there has been a failure of expression.

If the parties by their contract had intended to incorporate the premium notice law of New York into it as a part thereof, and had expressly done so, then this law might govern. No question of public policy arises for consideration. The parties were engaged in the transaction of business in the State of Washington, where the contract was made, and were entirely at liberty to make that contract if they saw fit. Their contract was made by the separate constating instruments, the application and the policy. The policy was the last of these instruments. It was based upon the first, and by reference made the first a part of it. The policy contained the express provision above referred to, waiving any notice required by statute. This being the last statement of the contracting parties, there is no room for construction as to what their intention was. They could not, in view of the above, have meant the premium notice law of New York should govern. It was manifestly not their intention. They

had expressly provided in the policy, the latest instrument passing between them, that neither this nor any notice statute of any state should govern. By accepting this policy, the insured clearly intended to limit the special clause in his application, so that this particular law of New York should not govern the contract. This notice law was clearly intended only for the benefit and protection of the insured.

No expression of the Supreme Court of the United States has yet been given from which we are able to determine conclusively what would be its holding upon this question of waiver, where a policy of insurance was, in fact, issued and delivered in New York to a citizen of that state with residence and post office address there, and which would otherwise, were it not for a waiver, be applicable. The contract *having, in fact, been made in Washington*, the rights of the parties cannot be affected by the public policy of the state of New York, whatever that may be. They are affected by the public policy of the state of Washington only. They had liberty of contract there *and were not obliged to contract into the policy any premium notice statute.* Any lawful contract *there made* will be upheld, any unlawful contract or stipulation, defeated. The Court which adjudicates the rights of the parties, under such a contract as this, must seek to arrive at the true intention of the parties, and that intention alone, when lawful, must govern, unaffected by any question of public policy, except that of the State in which *the contract was, in fact, made*, and equally unaffected by any law except as such law expresses a part of *the agreement* which the parties have made, or a rule of interpretation of such agreement. Looking again at the particular facts in this case, for the purpose of ascertaining the intention of the parties: Mr. Hill made an application in Washington, for insur-

ance to the defendant company. In that application he made certain representations and warranties, and in it he agreed that there should be no contract of insurance until a policy had been issued and delivered to him, and the first premium paid; and that the declarations, agreements and warranties contained in the application should be a part of the contract of insurance when made, which contract should be construed to have been made in the City of New York, and which application contained a notice and warning that if any policy was issued he could not rely on a premium notice being sent. Upon this proposal for insurance the Company issued a policy. That policy, in its first sentence referring to the application, and making the same a part of the contract, expressly provided that "*notice that each and every such payment (of premium) is due at the date named in the policy, is given and accepted by the delivery and acceptance of this policy, and any other notice required by any statute, is thereby expressly waived.*" This policy was forwarded to Seattle and tendered to Mr. Hill, the applicant. *If the proper interpretation of the provision in the application, that any contract of insurance to be issued thereon shall at all times and places be construed to have been made in the City of New York, is that the right of the parties shall be governed absolutely by the premium notice law 1877, then the policy issued thereon was not an unqualified acceptance by the Company of the proposal made by the applicant. In the clearest and most unqualified terms it declares that the rights of the parties shall not be governed by any statute on the subject of notice, and that the requirments of any such statute are expressly waived. Hill had asked for a policy in an application which told him he could not rely on notice.* Hill was, therefore, at liberty to reject this policy as not being an unqualified

acceptance of his proposal. When he accepted it, he assented to its terms; he bound himself by all of its conditions and stipulations. It was the last of the constating instruments which made up the contract of the parties. Its provisions were clear; its meaning was unmistakable; its terms consistent with the laws of Washington. There was no room for construction as to what was the intention of the contracting parties. No Court, therefore, should hesitate to give full force and effect to the intention of the parties so clearly and unequivocally expressed in their contract.

If Mr. Warburton claims that the waiver is invalid under the laws of New York then the very fact that the stipulation as to waiver was introduced into the policy is cogent evidence of the intention that the New York statute should not govern, on the principle that when a contract is open to two constructions, the one lawful and the other unlawful, the former must be adopted.

Thus in Missouri S. S. Co., 42 Ch. D. (1889) Chitty J. says, "The circumstance that the stipulations which "the Claimant asks to have struck out of the contracts "are allowed by the law of one country, and disallowed "by the law of the other country, affords a cogent "reason for holding that the parties were contracting "with reference to the law of the country which allowed "and not to the law which disallowed the stipulations. "It is unreasonale to presume that the parties inserted "in the contracts stipulations which they intended "should be nugatory and void."

This decision is upon the well-established principle that when a contract is open to two constructions, the one lawful and the other un'awful, the former must be adopted.

Hobbs *v.* McLean, 117, U. S., 576.
U. S. *v.* Cent. Pac. R. R. 118 U. S., 236.
Burdon Sugar Co. *v.* Payne, 167 U. S., 142.

So in Bank of Kentucky *v.* Adams Express Co., 93 U. S., 181, this court says: "The language is very broad; but it must be construed reasonably, and, if possible, consistently with the law. *It is not to be presumed the parties intended to make a contract which the law does not allow.*"

Also

Ewing *v.* Howard, 7 Wallace, 506.
Lorillard *v.* Clyde, 86 N. Y., 387.

So in Wiggins Ferry Co., *v.* R. R. Co., 128 Mo., 224, where under one construction of a contract, it would have been contrary to public policy and void, it was so construed as to uphold it as a legal contract.

The theory of defendant-in-error that the insurance company is estopped from claiming that the contract was not actually made in the City of New York, can have no controlling effect upon the rights of the parties under the terms of the contract.

Hill, while a resident of Seattle, Washington, made and forwarded to the Insurance Company of New York City, an application for insurance. This application contained an agreement on his part that "the contract of insurance when made shall be held and construed at all times and places to have been made in the City of New York," but also contained warning to him that he could not rely on a notice. Upon this application a policy was in fact issued, which by express reference made the application a part of it. Had there been nothing in the policy about waiving any notice, statute, the legal situation claimed by the plaintiff would have more reason to support it. But in such a case the application of the laws of the State of New York would rest solely upon the convention of the parties. These laws would not operate upon the parties nor control their

rights by their own force, but solely by virtue of the expressed intention of the contracting parties.

In this case, however, the policy which was issued upon the application of Hill contained the express provision that "notice that each and every such payment (of premium) is due at the date named in the policy, is given and accepted by the delivery and acceptance of this policy, and any other notice required by any statute is hereby expressly waived." It is thus made evident that the parties intended that their contract of insurance should not in any wise be controlled or affected by the premium notice statute of the State of New York. The theory of estoppel can, therefore, have no application to this case, the only question involved being the application of the premium notice statute.

(3.) *The claim of the plaintiffs involves the finding of an express intent to make the New York notice statute which has no extra territorial operation, operate extra territorially by agreement, the effect of which would be to change the statute by agreement. This intent is baseless and unreasonable. The statute is drawn with reference to New York business alone.*

The language in the application in the Cohen case *expressed* the intent as to certain laws, the language used being "subject to the charter of such company and the "laws of said State," and this Court in the Cohen case confined the "laws" to those of New York relating to the application, but said "Further, it may be noticed "that even if the language justifies a broader con- "struction, it may well mean only such laws of the "State of New York as are * * * intended to "have extraterritorial application, should be con- "sidered a part of the policy."

This Court had already held that the statute was not intended to have any extra-territorial effect, and hence the parties to the Hill contract did not intend by this clause to make a statute which related solely to the business of collecting premiums in New York State, applicable to such business in Washington.

The broad doctrine of the Cohen case is that the statute did not apply to the business of collecting premiums outside New York State from persons resident outside that State and whose post-office addresses were not within that State, and the clause in question shows no intent to alter such effect of the statute.

If the contention of the plaintiff could be maintained it would necessarily involve an agreement intending to change the statute itself.

For instance, under the statute of 1877, the notice must be served at least 30 days, and under the statutes of 1892 and 1897, at least 15 days. This is an arbitrary time, but *reasonable as the Supreme Court of the United States says as to all policies within the State of New York*, that is as to all insured who reside or have Post Office addresses in New York State, yet the Court goes on and says, that when it is remembered that some at least of the New York Insurance Companies are doing business in all quarters of the globe, it is obvious that a 30 day notice in many cases would be of little avail. The clauses in the Hill application and policy in question did not purport to change the time, therefore the time which is reasonable under the New York statute is by these particular clauses to be made reasonable for Washington, some three thousand miles away, which is unwarrantable. A 15-day notice would be entirely impracticable.

Again, under the ruling of this Court the statutes relate solely to collection of premiums within New York State and where the residence and Post

Office address is in the State of New York. Can it be claimed that this clause applied where there was no collection within New York State and no residence and no Post Office address in the State of New York? Even thongh a policy holder resided and had his Post Office address in Washington, he might yet agree in proper language for a Post office address within the State of New York and declare that a notice should be sent to him under the Statute to some address in New York State, but Hill did nothing of that kind, so that if this clause is to be applied it would be necessary to change the statute by agreement and to consider as made an agreement substituting his Post Office address in Washington for the New York address referred to in the Statute.

Again, the Supreme Court of the United States says: "Further, by Section 2 the Statute provides that an "affidavit by one authorized to mail the notice shall be "'presumptive evidence' of the giving of notice. Can "it be supposed that the Legislature of New York was "contemplating a rule of evidence to be enforced in "every State and Nation of the world?" The contention of the plaintiffs would also involve a change of the statute in this particular, and would contemplate affidavits made in Washington and the changing of the rules of Evidence in the Courts of that State by agreement between the parties.

The argument, therefore, that this clause introduces the New York Premium Notice Statute into the business of collecting premiums in Washington on the Hill policies must either make the statute operative extra territorially, which is expressly opposed to the doctrine of the Supreme Court of the United States, or must involve a change in the terms of the statute by agreement of the parties, and there is no ground whatever for this.

(4.) *The Baxter application and policy were not similar to the Hill application and policy ;* since the special clause in the Baxter policy had the words therein "*and to be executed*", and the application and policy were otherwise different also.

In the Baxter case it was assumed that the New York law applied. There is no discussion whatever in the briefs of counsel whether the law did apply or did not apply.

Counsel for the defendant moved for a non-suit on the ground that the insured had failed to comply with the terms and conditions of the policy by neglecting to pay the quarterly premium stipulated to be paid by the terms of the policy on the 24th day of August prior to the death of the insured. The motion was denied, and no other evidence was given. The Court directed the jury to find a verdict in favor of the plaintiff.

In the Baxter case the policy bore date *May 24th, 1884*, and the insured died *September 7th, 1884*. The defense was that the quarterly premium which had become due August 24th, 1884, was not paid.

The policy was payable to the beneficiary "at the Home Office of said Company, in the City of New York within 60 days after receipt of satisfactory proofs of the death during the continuance of this policy of Joel J. Matteson of Bradford, in the County of McKean, State of Pennsylvania".

There was no direct provision in the policy as to where the premiums were payable, but from its language presumably in New York.

The policy also states, " In witness whereof the Brooklyn Life Insurance Company have by their President and Secretary signed and delivered this contract at the City of New York, in the State of New York, this 24th

day of May, one thousand eight hundred and eighty-four."

On the back of the policy is the following provision:

"6th. This policy *is a contract made and to be executed* in the State of New York, and shall be construed only according to the *laws of that State*, and no suit shall be brought against the Company upon this policy except in the Courts of that State, or in the Circuit or District Courts of the United States, nor shall any such suit be brought after the lapse of one year from the time when the cause of action accrues."

This recital is one of fact, viz, "This policy is a contract made, &c."

There was nothing whatever in the policy or in the case to show that the policy was not applied for and delivered in the State of New York, nor does it appear at all what the Post Office address of Matteson, the insured, was, nor does it clearly appear where he resided.

There is no discussion whatever in any part of the case or in the briefs of counsel that the New York Statute applied, but it was simply assumed that it did.

(5.) *The special clause covers primarily any laws of New York as to declarations, agreements and warranties in the application, and the legal situation is the same in this respect as in the Cohen case.*

The special clause referred to, taken in connection with another clause in the application, similar to that in the Cohen application, has substantially the same effect as that in the Cohen case, and its operation is limited as this Court limited the clause in the Cohen case, viz., saying: "Its meaning is clear and is that no local "statute as to the effect of statements or representa- "tions or any other matter in the application should in "these respects override the provisions of the Charter "and the laws of New York."

The clauses in the Hill application are as follows: "Application to the Mutual Life Insurance Company "of New York for a five year distribution policy sub- "ject to the Charter of said Company and laws of said "State"

Followed by this clause in another part:

"And that if said policy be issued the declarations, "agreements and warranties herein contained shall be "a part thereof, and the contract of insurance when "made shall be held and construed at all times and "places to be made in the City of New York."

It is apparent from this clause that the same doctrine of this Court obtains in this case as did in the Cohen case.

It will be noticed that the provision as to the construction of the contract follows immediately the statement that *the declarations, agreements and warranties in the application* shall be a part of the contract. The only reference to any laws in the Hill application is in the clause similar to the Cohen clause, "application subject to the Charter and Laws, etc."

The effect of the 2d clause, however, is simply that that the declarations, agreements and warranties are subject to the New York Laws relating to statements in application and the effect of warranties whether contained in the application or the policy.

In addition to previous arguments, this also clearly excludes any idea that these clauses have any relation whatever to the business of sending premium notices.

These clauses clearly and conclusively show the parties had their minds upon the *preliminary* part of the contract, the matters embraced within the *application*, respecting the truthfulness and correctness of which the insurance company was compelled to rely upon the applicant, and it was to

bring these statements, representations and warranties under the laws of New York that these clauses were employed. It will be noticed, however, that no reference is made to a *statute of New York, except* as applied to the *application*. It is studiously provided that the statements, representations and warranties made in the application shall be a part of the contract. It is expressly and separately provided that the *application* is subject to the *laws of the State of New York*. The contract as a whole, and the preliminary part of it, the application, are both dealt with in the clause under consideration, while the subject of notice of the due date of premiums is entirely eliminated from consideration in this part of the contract. The contract itself, and not what may subsequently be done in the way of giving notice of when premiums fall due, is here treated of. *The subject of notice is also dealt with expressly and separately.* As to the whole contract, including the application, the parties say it shall, when made, be held and construed to be made in the City of New York, but in addition to that, the preliminary part of the contract shall be *subject to the laws of the State of New York*. The familiar maxim of *expressio unius est exclusio alterius* would eliminate the question of notice from the operation of the New York statutes. Parties stipulate that the contract as a whole, including the application, shall be deemed made in New York, but that part of the contract embraced within the *application*, including the statements, representations and warranties, shall be *subject to the laws of New York*, thereby clearly showing that so far as express provision is concerned, the policy otherwise, shall not be subject to the laws of that State, unless through inference as opposed to express provision it be brought under that statute.

The language employed to effect the two objects we

have recited, to make the preliminary contract so far as relates to the application subject to the laws of the State of New York, and to be construed by them, and to eliminate the statutes respecting the notice of the time of premium, and fix the rights and the relations of the parties in that particular by the express terms of their stipulations and nothing else, was not accidental, but each was treated and made complete in separate parts of the contract. In the case of Mutual Life *vs.* Cohen, 179 U. S., at page 267, in commenting upon this clause relating to the application, the court says:

> "It recites that it is 'subject to the charter of such company and the laws of said State'; and the contract refers to the application, and declares that it is issued 'in consideration of the application for this policy and of the truth of the several statements made therein.' While the contract is based upon the application, yet the latter is only a preliminary instrument, a proposal on the part of the insured, and a stipulation that it shall be controlled by the charter and the laws of the state is not tantamount to a stipulation that the policy issued thereon shall also in like manner be controlled. That such language was incorporated into the application is not strange. Its meaning is clear, and is that no local statute as to the effect of statements or representations or any other matter in the application should in these respects override the provisions of the charter and the laws of New York. In other words, if by the charter or the laws of New York any statement in an application is to be taken as a warranty, no local statute declaring that all statements in an application are to be taken as simply representations, shall override the terms of the charter and the New York law. But that is very different from a provision that the contract issued upon such application should also be in all its respects controlled by the laws of New York."

Had it been the purpose of the parties that the New

York statue respecting notice shall be controlling, it would have been an easy matter to have so provided in the contract. Had such been the intent, the parties would not have expressly stipulated that *no notice whatever* should be given *save* that expressed in the contract; and that that, and *it alone*, should be controlling, "and any further notice required by any statute (whether of New York or Washington) is hereby expressly waived," and instead of such stipulation they would have stipulated expressly, as in the case of the application, that in regard to notice the contract was subject to the laws of the state of New York, and was "to be executed there" as declared in the case of Baxter *vs.* Brooklyn, 119 N. Y.,450, 454. As stated by the Supreme Court in this, as in the Baxter case, the parties would have had a different stipulation, namely, "that the contract *was to be executed* in the State of New York, and construed only according to the laws of that state," or a general provision would have been made that the contract was to be governed in all respects by the laws of New York.

6. Even if the policy had been actually made in the City of New York the notice statute would not have operated upon the business of collecting its premiums in the State of Washington, even if also it had not been waived.

Part performance of the contract was to be in Washington, namely payment of premiums.

The clause is that contract when made shall be construed to have been made in New York. Grant this, but suppose a contract made in New York on life in Italy, resident in Italy, post-office address in Italy, is there any intent that a New York statutory notice of premium due shall be mailed to Italy? Certainly not, as the Supreme Court says. In like manner the Hill

contract in referring to where the contract shall be held to have been *made* does not import an intent that a statutory notice shall be mailed to a resident of the State of Washington, with post office address there.

In the person of its local agent the insurance company was present at Seattle, and so was Hill, the insured, at the time the first premium was paid and the policy delivered and the contract there first came into being. So that in truth and reality the contract was one made in the State of Washington. After being made in the State of Washington, the parties mutually agreed that it should be deemed and construed to be made in New York City. *They resorted to fiction as against fact, and this fiction is invoked in this case for injustice and inequity, to obtain an insurance that never was paid for; to recover that to which no moral claim can be laid.* Fictions are not entertained for such purposes, but only to promote equity and justice.

Gibson v. *Chouteau*, 13 Wallace, 101.
Newhall v. *Sanger*, 92 U. S., 766.
Smith v. *Furbish*, 44 Atl., 408.

Even though by fiction, intendment and convention of the parties, this contract is to be deemed made in New York, that does not debar the parties outside the State of New York from incorporating in it, or expressly withholding from it, any particular law or laws of the State of New York. Their situation is totally different in this respect from that of parties in that, state. The public policy, if there be one, created by the New York statute, cannot and does not reach them in the State of Washington, where they make the contract, and where they are at liberty to adopt in the execution of their contract whatever rule they see fit as to notice. Besides, the statute of New York could have no application iu the making of the contract, to

those in that state, and can have no function whatever to perform until after the contract has been made. At most to persons actually within and contracting insurance within that state, the statute does not purport to operate *upon the contract*, but to operate only upon *one of the parties to it*, and that at a time *subsequent* to its execution.

In the case of the making of the contract outside of the state and deeming it made in New York, it would be by conventional arrangement and not by legislative force, the New York statute would affect the remedy, and not as a matter of public policy. The converse of the proposition might not be true. If the parties were actually within New York, within the territory of the operation of the New York statute, and the insured had a residence and post-office address within that State, it might be claimed to be beyond the power of the parties to stipulate that although the contract in fact came into existence in the State of New York, where the money was paid and the policy delivered, and where the insured had a post-office address, yet in theory and by fiction it should be deemed made in the State of Washington, and that the law of New York relating to notice should not apply. In such case the parties, through their agreement, might be claimed to be attempting to override the will of the legislature, indirectly contravening the legislative policy.

The clause in the application on which the plaintiffs rely merely is to the effect that the contract shall be considered as having been *made* in New York. This particular clause contains nothing concerning performance of the contract in payment by the Company of the amount insured, nor does it say anything concerning performance of conditions by the insured necessary to the continued existence of the contract, such as payment of the premiums.

The natural meaning of the clause in the application is that the making of the contract, *i.e.*, the entering into of the contract, or the creation of the obligation and all the elements involved in this idea, are to be governed and determined by the law of New York, *e. g.* mutual assent and form.

As the clause refers merely to the making of the contract, that is, its initiation, it has nothing to do with the performance of the contract by the Company nor with the performance of conditions by the insured. The clause has reference solely to the *lex loci celebrationis contractus*. It has nothing to do with the *lex loci solutionis*.

This Court in Scudder *vs.* Union National Bank, 91 U. S., 413, well says:

> "Matters bearing upon the execution, the interpretation and the validity of a contract, are determined by the law of the place where the contract was made. Matters connected with its performance are regulated by the law prevailing at the place of performance. Matters respecting the remedy, such as the bringing of suits, admissibility of evidence, statutes of limitations, depend upon the law of the place where the suit is brought."

In the absence of an agreement upon the subject between the contracting parties, nothing is more natural or reasonable than that the performance of conditions by the insured should be subject to the law of the place where they are to be performed (*lex loci actus*).

Taking the policy and application together as constituting the contract of the parties, we find:

1. An express agreement that New York shall be considered the *locus celebrationis* (place of making) of the contract.

Such express agreement is contained in the application and is as follows: "The contract of insurance when made shall be held and considered at all times and places to have been made in the City of New York."

2. An express agreement that the *locus solutionis* (place of payment or performance) *of the sum insured* shall be the City of New York.

Such express agreement is contained in the policy and is as follows: "The Mutual Life Insurance Company of New York promises to pay at its Home Office in the City of New York unto Ellen Kellogg Hill" etc.

3. An express agreement that the *locus solutionis* (place of payment or performance) *of the premiums* is the City of New York *or elsewhere in exchange for the Company's receipt*, and the proof showed it was Washington.

Such express agreement is contained in the policy and is as follows: "PAYMENT OF PREMIUMS.—Each premium is due and payable at the Home Office of the Company in the City of New York but will be accepted elsewhere when duly paid in exchange for the Company's receipt signed by the President or Secretary."

It was abundantly proved that the first premium was paid in Washington, and that the second was demanded in Washington, and that the practice was to forward the Company's receipt to the Pacific coast and collect premiums there on all such policies.

The Company had the option *to select* the place of performance of the payment of premiums and it selected Washington.

In Minor, Conflict of Laws, Section 155, we find a pertinent statement:

"Three leading elements in every contract.—Each may have a separate situs. * * *

"The essential elements or circumstances, around which all the incidents of contracts revolve are (1) the *making* of the contract; (2) the *consideration* supporting the contract; and (3) the *performance* of the contract * * *".

"Everything relating to the *making* of the contract is to be governed by the *law of the place where it is made;* everything relating to the *performance* of the contract is to be controlled by the law *of the place of performance;* and wherever the legality or the sufficiency of the *consideration* is the subject of inquiry the law of situs of the consideration is to govern * * * . What is the proper law for one purpose connected with the contract may not be the proper law for another purpose. This has been recognized in a New York case (Hibernia National Bank *v.* Lacombe, 84 N. Y., 378), where the court said: "The law of the place of contract *is not necessarily one place. It is the law of all the places to which and for the purposes of which it has reference.* A bill of exchange therefore is to be construed according to the law of each place at which it is contemplated that something is to be done by either of the parties."

The effect of the agreement in the application is merely to determine the place of *making* of the contract. This is merely an agreement as to a fact. It is not at all an agreement as to what law shall be applicable, except that it gives a basis for the application of the legal rule that the law of the place of the making of a contract governs such subjects as mutual assent; offer and acceptance; formal requisites, such as the form and contents of the instrument expressing the contract, signature, revenue stamps, etc.; validity of assent including contractual capacity; mistake or ignorance of

law or fact; fraud and misrepresentation; duress and undue influence.

The clause in the application does not touch the question of the place of *performance* nor the law governing performance. The question, therefore, of what law governs the performance of conditions (such as the payment of premiums) must be determined either by application of the settled rules of law or by reference to other parts of the contract than the application.

And this brings us to the proposition,

7. The intent of the parties, that the premium notice statute should not govern is still further indicated by the application of the lex loci solutionis, as the place of part performance, in respect to the matter which is in dispute, namely, the payment of premiums, was in Washington and not in the State of New York.

In addition to the reasons and arguments heretofore advanced showing that the special clause as to the *making* of the contract, did not make it governed by the New York statute, it is clear that performance in the matter of the collection of premiums was to be in Washington, so that it is to be presumed that the law of Washington governed on this point.

In Hibernia National Bk. *v.* Lacombe, 84 New York, 378, the Court says: "But, again, the law of the place of "contract is not necessarily one place. It is the law of "all the places to which and for the purposes for which "it has reference. A bill of exchange, therefore, is to be "construed according to the laws of *each place at which* "*the contract contemplated that something is to be* "*done by either of the parties.*"

Now in this case we have premiums payable and collectible in Washington at the option of the company and the only premium paid actually collected there, and a statute in New York which this Court has de-

cided has no extra-territorial effect. There are numerous cases in this Court applying the law of the place of performance as the one governing the construction and effect of the contract.

Supervisors *v.* Galbraith, 93 U. S., 214, where the law of New York as *lex loci solutionis* was applied as against the *lex loci celebrationis*, viz.: Mississippi, and a Mississippi statute held not applicable.

In Union National Bank *v.* Chapman, 169 N. Y., 538, it was held as follows: All matters bearing upon the execution [*i.e.*, formation], the interpretation, and the validity of contracts, including the capacity of the parties to contract, are determined by the place where the contract is made, while all matters connected with its performance, including presentation, *notice*, *demand*, etc., are regulated by the law of the place where the contract by its terms is to be performed.

Our contention is that there is no one arbitrary rule which obtains amongst the doctrines of the conflict of laws which can be applied in this case to definitely solve by itself the question whether the non-extraterritorial premium statute of New York controls the collection of premiums. We maintain that the various rules in regard to the *lex loci contractus*, which may be either the *lex loci celebrationis*, or the *lex loci solutionis*, only serve as guides in this case to assist in ascertaining the intention of the parties, and the intention of the parties must be gathered from all the circumstances read in the light of the various principles applicable to the doctrine of conflict of laws. It is impossible to reconcile all the applications of the various doctrines of the conflict of laws in the different States in this country and even in this Court. This is not only owing to the inherent difficulty of the subject, but to the fact that while one rule may seem to indicate the intention of the parties from one point of view, yet from another

point of view a different rule would seem to indicate a different intention. The rule for solving questions such as are presented here lies not in the rigid application of arbitrary rules, but in getting at what on the whole is the intention of the parties. It has been said that "much of the seeming conflict in the adjudications upon the subject of the *lex loci contractus* will disappear by carefully discriminating as to the precise nature of the issue and matter under consideration."

Seamans *vs.* Knapp Co., 89 Wis., 182.

"Whether a French policy would have been so construed is again immaterial. It is no doubt competent to an underwriter on an English policy to stipulate, if he think fit, that such policy shall be construed and applied *in whole or in part* according to the law of any foreign state, as if it had been made in and by a subject of the foreign state, and the policy in question does so stipulate as regards general average, but except when it is so stipulated the policy must be construed according to our law and without regard to the nationality of the vessel. Our judgment is, therefore, for the defendants."

Greer *v.* Poole, Law Reports, 5Q. B., p. 274.

"The learned Judges in the Court below treat the *lex loci solutionis* of the main portion of the contract as conclusively determining that all the rights of the parties under the contract must be governed by the law of that place. I am unable to agree with them in this conclusion. Where a contract is entered into between parties residing in different places, where different systems of law prevail, it is a question, as it appears to me, in each case, with reference to what law the parties contracted *and according to what law it was their inten-*

tion that their rights either under the whole or any part of the contract should be determined. In considering what law is to govern, no doubt the *lex loci solutionis* is a matter of great importance. The *lex loci contractus* is also of importance. In the present case the place of contract was different from the place of its performance. It is not necessary to enter upon the inquiry, which was a good deal discussed at the bar, to which of these considerations the greatest weight is to be attributed, namely, the place where the contract was made, or the place where it is to be performed. In my view they are both matters which must be taken into consideration, *but neither of them is, of itself, conclusive*, and still less is it conclusive, as it appears to me, as to the particular law which was intended to govern particular parts of the contract between the parties. In this case, as in all such cases, the whole of the contract must be looked at and the rights under it must he regulated by the intention of the parties as appearing from the contract. It is perfectly competent to those who, under such circumstances as I have indicated are entering into a contract, to indicate by the terms which they employ, which system of law they intend to be applied to the construction of the contract and to the determination of the rights arising out of it."

Hamlyn & Co. *v.* Talisker Distillery, Law Reports [1894], Appeal Cases, p. 207 (House of Lords).

The broad rule is that the law of a country where a contract is made presumably governs the nature, the obligation and the interpretation of it, unless the contrary appears to be the express intention of the parties. "The general rule," says Lord MANSFIELD, "established *ex comitate et jure gentium* is that the place

where the contract is made, and not where the action is brought, is to be considered in expounding and enforcing the contract. But this rule admits of an exception where the parties at the time of making the contract had a view to a different kingdom"; Robinson *v.* Bland (1): (see Peninsular and Oriental Steam Navigation Co. *v.* Shand). (2) This principle was explained by the Exchequer Chamber in the case of Lloyd *v.* Guibert (3), as follows: "It is generally agreed that the law of the place where the contract is made is *prima facie* that which the parties intended, or ought to be presumed to have adopted as the footing upon which they dealt, and that such law ought, therefore, to prevail in the absence of circumstances indicating a different intention, as, for instance, that the contract is to be entirely performed elsewhere, or that the subject-matter is immovable property situate in another country, and so forth; which latter, though sometimes treated as distinct rules, appear more properly to be classed as exceptions to the more general one, by reason of the circumstances indicating an intention to be bound by a law different from that of the place where the contract is made; which intention is inferred from the subject-matter and from the surrounding circumstances so far as they are relevant to construe and determine the character of the contract". It is obvious, however, that the subject-matter of each contract must be looked at as well as the residence of the contracting parties or the place where the contract is made. The place of performance is necessarily in many cases the place where the obligations of the contract will have to be enforced, and hence, as well as for other reasons, has been introduced another canon of construction, to the effect that the law of the place of fulfillment of a contract determines its obligations. But this maxim, as well as the former, must of course give

way to any inference that can legitimately be drawn from the character of the contract and the nature of the transaction. In most cases no doubt where a contract has to be wholly performed abroad, the reasonable presumption may be that it is intended to be a foreign contract determined by foreign law; but this *prima facie* view is in its turn capable of being rebutted by the expressed or implied intention of the parties as deduced from other circumstances. *Again, it may be that the contract is partly to be performed in one place and partly in another.* In such a case the only certain guide is to be found in applying sound ideas of business, convenience, and sense to the language of the contract itself, with a view to discovering from it the true intention of the parties. Even in respect of any performance that is to take place abroad, the parties may still have desired that their liabilities and obligations shall be governed by English law; or it may be that they have intended to incorporate the foreign law to regulate the method and manner of performance abroad, without altering any of the incidents which attach to the contract according to English law. Stereotyped rules laid down by juridcal writers cannot, therefore, be accepted as infallible canons of interpretation in these days, when commercial transactions have altered in character and increased in complexity; and there can be no hard and-fast rule by which to construe the multiform commercial agreements with which in modern times we have to deal Jacobs *v.* Crédit Lyonnais, Law Reports, 12 Q. B. Div., 600.

In Bottomley *v.* Metropolitan Life Ins. Co., 170 Mass., 274, the Court, in considering a policy issued by a New York Company to a resident of Rhode Island, used the following language:

> "There can be little doubt that this policy was a "Rhode Island contract. * * * Not only was

"the assured a resident of Rhode Island, but the "probable place of performance was also there. "* * * The place of performance will ordinar- "ily be deemed the place of a contract, unless the "parties intended otherwise."

In Pritchard *v.* Norton, 106 U. S., 136, MATTHEWS, J., quotes Marshall:

"The principle that in every forum a contract is "governed by the law with a view to which it was "made."

We think we can challenge the counsel for Hill in this case to produce a single instance where a non-extraterritorial statute has been given extra-territorial operation simply because the contract contained a clause stating that it should be considered to have been *made* within the same jurisdiction as that of the non-extraterritorial statute. A consideration of some of the cases cited by Mr. Warburton would show, we think, the impossibility of reaching the real intention of the parties by applying any one arbitrary rule.

In the Pollard case the Virginia Court held that the contract of an Ohio company which contained a clause similar to that in the Hill case having been made with reference to the laws of the State of Ohio, the plaintiff had a right to rely upon them in enforcing his contract so far as they related to its validity, nature, interpretation and effect. The Virginia Court thereupon applied the Ohio statute to the Ohio company in regard to the materiality as warranted to certain answers in the application. The statute law of Ohio in regard to the materiality of answers in the application has no analogy to the premium notice statute of New York expressly decided by this Court to have no extra-territorial operation.

In the Goodwin case the Iowa Court considered

whether the Iowa statute in regard to the attaching of application applied to the contract before it. The Court held that the contract was either a Nebraska contract or a New York contract, and then said that as there was no proof on the subject it would assume that the law of New York was the same as the *lex fori*, therefore the application should have been attached. This also is in no sense giving a non-extraterritorial statute an extraterritorial effect by convention of the parties.

In the case of Penn Mutual *v.* Mechanics Savings Bank, in 72 Fed., there was an agreement in the policy that "the place of contract shall be the City of Philadelphia." The expression "place of contract" is entirely different from the agreement in the Hill application to the effect that the contract shall be considered to have been *made* in New York. "Place of contract" includes any and all places where anything is to be done under the contract as well as place of making of the contract. This clearly appears from the opinion in Pritchard *v.* Norton, 106 U. S., 136, quoted below.

In the Hume Case, 128 U. S., there was an agreement in the policy of a Kentucky corporation that the policy was to be in all respects construed and determined in accordance with the laws of Kentucky and the statute of Kentucky which the Court applied was itself printed on the policy. Under these circumstances there could be no question, of course, whether such statute was applicable or not.

In the Griesemer case the policy contained a clause wholly unlike that in this Hill case, viz., "This policy is a contract made *and to be executed* in the State of New York and shall be construed only according to the charter of the Company and the laws of that State". And the Court says: *from which it clearly appears*

that it was the intent of the parties to locate the place of its execution in the State of New York.

The plaintiff quotes the opinion of Mr. Justice Harlan in the case of Coghlan *vs.* Railway Company, 142 U. S., page 101, where Mr. Justice Harlan quotes Lord Mansfield as saying: "That the law of the place can "never be the rule when the transaction is entered into "with an express view to the law of another country as the "rule by which it is to be governed". In this statement Mr. Justice Harlan takes precisely the position we take here, namely, that the intention of the parties on the whole contract plainly shows that the New York Premium Notice shall not govern and rebuts every contrary presumption.

Mr. Justice HARLAN says:

> "The only basis for this contention is the mere "fact that the bonds purport to have been made in "that State, but that fact is not conclusive. All "the terms of the contract must be examined, in "connection with the attendant circumstances, to "ascertain what law was in the view of the parties "when the contract was executed."

And shortly after this the learned Justice in the same opinion says: "What law, then, did the parties have in "view as determining the legal consequences resulting "from the non-performance of the contract between "them. Presumptively the law of England, where the "contract was to be entirely performed," whereas, Mr. Justice Brewer, in the Cohen case, said, the presumption is in favor of the law of the place of the contract. We presume by this that Mr. Justice Brewer means the *lex loci celebrationis*, not the *lex loci solutionis*, although the latter may have been meant.

Mr. Justice MATTHEWS said in Pritchard *vs.* Norton, 106 U. S., 136: "The phrase *lex loci contractus* is used

" in a double sense, to mean, sometimes, the law of the " place where a contract is entered into; sometimes, " that of the place of its performance."

In the London Assurance case Mr. Justice Peckham's attention was directed entirely to the law of the place of performance, but all cases relating to the application of the law of the place of performance is in the Company's favor, as the question at bar is one relating to the performance of the payment of premiums by the insured, which under the contract should take place in the State of Washington.

In the Johnson case, 78 Northwestern, 905, the stipulation was, as Mr. Warburton says, that the contract should be construed and *governed by the laws of New York*, which is an entirely different clause to that contained in the Hill case, which only refers to a convention as to where the contract was made, and it must always be remembered that while it is true, as this Court said in the Coghlan case, that the presumption is favor of the place of the contract, this Court has also said, there is no room for inference or presumption as to what the intention was when it was expressed in the contract.

Pritchard *vs.* Norton, 106 U. S., 124.

Our claim is that the whole contract taken together and the fact that the statute in question does not operate extra-territorially, rebuts any inference and presumption which might be drawn by applying arbitrary rules to this contract.

In Pinney *v.* Nelson, 183 U. S., 148, this court held that the fact that parties to a contract had in view some other law than that of the place of execution (*lex loci celebrationis*) may be shown by reference to the terms of the contract and purpose with which it was made.

15578

There is nothing in the case of Knott *v.* Botany Mills, 179 U. S., 59, which conflicts with the principles of the cases above cited. In the Knott case the statute involved was the "Harter Act" forbidding carriers to exempt themselves from responsibility for loss or damage arising from their negligence, and in effect declaring that any stipulation for such exemption was void as against public policy. In the New York premium notice statute there is no such declaration.

In the case of Mortgage Company *v.* Jefferson, 79 Miss., 778 (1892), the Court spoke as follows:

"The presumption of law is always in favor of the "legality of purpose and motive of contracting parties; "and where a contract is made in one state, to be exe- "cuted in another, and, under the laws of one would "be illegal and under those of the other legal, it is "reasonable to presume that the *parties intended their* "*contract to be controlled by the laws of the state in* "*which it would be valid*, and so the courts will, in fur- "therance of a presumed lawful intention, assign it to "that state by which its validity will be upheld."

POINT III.

Although the New York statute does not under the circumstances control, yet, even if the business of collecting the premiums was NewYork business controlled by such statute, the children of Hill, beneficiaries in the policy, are concluded by the failure to pay the premiums, Hill having had the equivalent of statutory notice and waived the same.

This case was decided in this Court at the same time as the Phinney, Allen and Sears (but prior to the Cohen case), and in this case, as well as in those, this Court deemed it unnecessary at that time to decide whether the premium notice statute of New York was applicable or not.

The Court says in the Cohen case, per Mr. Justice Brewer: "In the opinion (that is in the Phinney "case) we referred to the fact that there was a primary "question of the applicability of a statute of the State "of New York, but deemed it unnecessary to decide it. "That decision was followed by the case of the same "Company against Sears, 178 U. S., 345; *against Hill*, "*id.*, 347; against Allen, *id.*, 351, *all of which cases* "*were disposed of in like manner.*"

In the Cohen case it was decided that the premium notice statute of New York was not applicable, and that decision absolutely governs this case as shown in Point II above, the only contrary contention as to any point of difference by the plaintiffs being as to the effect of the particular clause in the Hill Policy above referred to in Point II. While we do not think it really necessary, in view of the inapplicability of the New

York statute, to argue the proposition stated above as Point III, yet as counsel makes the point it seems necessary to take it up.

(1.) *The opposing claim is that if the premium notice statute governs, then the children can recover, because the Cohen case has so decided, but no such point was either discussed or decided in the Cohen case.*

The only question in the Cohen case in the Supreme Court of the United States was whether the law of New York controlled. The Court held it did not.

The logical order of the questions involved was:

1st. Did the law apply?

2d. If it did apply, what was its effect in the particular case before the Court?

In the Phinney, Allen, Hill, and Sears cases the Court chose to take up the 2d question, and decided on the demurrers that it had no effect because policies were abandoned.

In the Cohen case the Court deemed it proper to take up the first and primary question of the extra-territorial operation of the statute, evidently, because the allegations in the Cohen answer were not sufficiently full to raise other questions. At the same time the Supreme Court of the United States did not really discuss at all the question of the position of the beneficiary. Therefore, so far as the Cohen and other cases are concerned, the question is entirely passed over by the Supreme Court of the United States.

In the Hill case in the Supreme Court of the United States the Court said:

> "It is doubtless an interesting question how far "the action of the insured can affect or bind the "beneficiaries in a life insurance policy. If the "answer in this case contained simply the allega-

"tion in respect to the insured's agreement with
"the company, we should be compelled to enter
"into an examination of that question."

The Cohen answer contained no allegations respecting Mrs. Cohen. The allegations were that Cohen neglected, failed, and refused to pay the premiums, that the policy was by Cohen suffered to lapse and become forfeited. No question could arise therefore in the Cohen case as to the effect of the notice to and the abandonment by the insured on the rights of Tine Cohen. There was no foundation laid for a discussion by the Court of the "interesting question". The Cohen pleadings were entirely barren of allegations similar to those contained in the Hill case, and the question therefore as to the effect of the notice to and abandonment by Hill and failure to pay by anyone is entirely an open question in this Court. When this Court says in the Cohen case that the notice was not given, and that hence, if the law of New York controlled, the policy was still in force and the plaintiff was entitled to recover, it referred only to what was before it on the demurrer to the answer, *which contained no allegation whatever relative to Mrs. Cohen, the plaintiff. Mr. Warburton does not notice that the pleadings being silent as to Mrs. Cohen, there was no claim by the Company that she was bound by Cohen's actions.*

To hold otherwise in regard to the opinion of the Supreme Court of the United States would be to strain such opinion far beyond its natural trend and effect.

There is not an element of equity or natural justice in this claim, but, on the contrary, it is repugnant to both justice and equity for nothing whatever was given as a basis for the recovery of a death loss following four years of defaulted premiums. There was no surplus or accumulation that could

carry this insurance beyond the one year for which it was paid. The plaintiffs asked the contract performing or persistent policyholders to pay out of a fund belonging to them insurance that was never purchased. It is not a case of which of two innocent persons shall be the sufferer, but purely and simply a demand without consideration;—a claim for contribution where no equivalent or partial equivalent has been given. It is the asking of inequity upon the basis of injustice, and seeking to make those who have met their contributions reward those who have failed. It is no wonder then, that in the light of such glaring and rank injustice, the Supreme Court was unwilling, though the question was not argued, to pass such a condition of affairs altogether unnoticed in a similar case, lest in doing so it might seem indifferent to the inequity.

(2.) *Hill failed to pay the premium after actual notice to him and abandoned the contract.*

Such non-payment by Hill terminated the contract as against the children, as no one else in their behalf performed the necessary condition of payment.

The Hill policy provides that if the wife be not living, then payment shall be made "to such of the children of "their bodies as shall be living at the death of the said "wife or to their guardian."

Mrs. Hill died February 14th, 1887, while said policy was in force, so that on April 29th, 1887, when the second premium became due and default was made, the children were the beneficiaries.

The only persons, therefore, whose actions have to be discussed are (1) Hill himself, (2) Hill's children.

This question must be approached from the point of view of this Court, which has laid down a doctrine in consonance with the peculiar nature of life insurance business and its principles.

In the case of Sears, 178 U. S. Supreme Court, 345, Mr. Justice Brewer, uttering the unanimous opinion of the court, places a different and opposite construction upon this statute from that of the learned counsel for Hill when he says:

"As we held in a prior case (Phinney), there is nothing in the statute of New York (if controlling at all) to prevent the parties from dealing with that as any other contract, and if they chose to abandon it, that action is conclusive."

It is thus seen that even if this contract had been actually made in the State of New York by parties there resident, and with post office address there, and the premiums solely payable in New York, this regulating statute of that State as to notice does not absolutely dominate the contract. It is merely a regulation of business, to be continued, altered or repealed at the pleasure of the legislature. It does not purport to affect or curtail the contracting power of the parties to policies of insurance. That statute not only left the contracting parties free and unembarrassed in what they might mutually do or omit to do, as if it had never been enacted, but left the insured equally unfettered; so that by mutual consent or abandonment, notwithstanding the statute, they could terminate the contract in any manner they saw fit. Their dealings toward each other would leave this contract as any other—and whatever would operate as a waiver or abandonment of any other contract, would be equally effectual with this policy of insurance.

The same view of this Court is upheld in the Allen case, 178 U. S., 351, in which this court says:

"From this answer it distinctly appears that Stewart, who was both the insured and the beneficiary, knew when the second annual premium became due, was informed of his default in the matter of payment, and

both he and the company agreed to the ending of the contract."

It follows from these enunciations of the law that the statute of New York does not enter into the contract in the sense that the policy cannot be abandoned by the insured except after notice sent. The New York statute does not in any manner impair this power of the insured.

In the Cohen, case, 179, U. S., 262, this Court reaches the conclusion that the New York statute does not enter into the charter of the company. The Court says:

"Undoubtedly a foreign insurance company making a contract within the State of New York would find that contract burdened by its provisions, and equally clear is it that such company making a contract in another State would be free from its limitations. There is no indication of an intent on the part of the Legislature of New York to affect, even if it were possible, the general powers of a foreign company coming within the State and transacting business. But on the face of the statute there is no express demarcation between foreign and local companies. There is no attempt to say that a foreign company doing business within the State shall, as to such business, be subject to the prescribed limitations, and that a home company doing business within the State and elsewhere, shall as to all its business be so limited. If we cannot from the language impute to the Legislature an intent to regulate the business of a foreign company outside of the State, how can we find in such language an intent to prescribe limitations upon the contracts of a home company outside the State?"

"And, again," says the Court, "it is worthy of notice that the State of New York has changed its legislation repeatedly in the last quarter of a century in respect to this very matter of notice."

"See Laws of 1876, Chap. 341, Sec. 1; the statute now under consideration, Laws of 1877; Laws of 1892, Chap. 690, Sec. 92. Laws of 1897, Chap. 218, Sec. 92.

The varying provisions of these statutes directed in terms not to local companies, but to companies doing business in the State of New York, strengthens the conclusion that the State was not thus changing the several charters of its companies, but prescribing only that which in its judgment from time to time was the proper rule for business transacted within the State."

The same view of the functions of the New York statute is forcibly presented by Hammond, J., in Rosenplanter *vs.* Provident Savings Life Assurance Society, 91 Fed., at pp. 733-4, as follows:

"If the provisions of the statute as to notice had been written in the policy as agreements of the parties, that would have been their contract, and, of course, the law could not make another contract for them; wherefore it would be enforced by the courts as the agreement of the parties. But the statute did not undertake to make a contract of insurance for the parties. It was only a statutory regulation for the government of insurance companies, compelling them to give notice, as required by the act, of the non-payment of premiums, before they would be allowed to declare a policy forfeited according to its stipulations. It was a regulation that the Legislature had a right to make. It was a beneficent regulation for the relief against a forfeiture created under the contract, which it was entirely competent for the Legislature to withdraw, alter or amend, as to it might seem best. Surely, if we turn the principle contended for the other way, its operation would be denied by the plaintiff and her counsel; that is to say, if an insurance company should contend that at the time of the passage of the act it had already issued a policy dfining the terms of forfeiture, and that it was not within the power of the Legislature to impair the obligation of that contract, by importing into it a different stipulation or provision as to the conditions of forfeiture, the beneficiaries would deny that such legislation unconstitutionally impaired the obligation, but if the Legislature has the power to import into an existing contract such a regulation for giving notice without impairing the obligation of the contract as to insurance compan-

ies, it has the right to take it away, by repeal, without impairing the obligation as to the beneficiary."

In this case this Court recognized on demurrer not only that the insured and the Company could abandon the contract, but also that the beneficiaries could refuse to continue, but as this Court has never *considered the position of a beneficiary in a New York case to which the statute applied*, we can show that any remarks in the Cohen case on this point were merely *obiter*.

There is no question, therefore, but that the Hill contract could have been terminated without the premium notice having been sent.

A cardinal thought to be always kept in mind is that Hill, as statutory agent, could *deal with the notice*, whatever views may be held whether he could *deal with the contract* as against beneficiaries.

The premium notice statute provides for notice to the insured, not to the beneficiary. *The insured is made the statutory agent for all parties interested* unless the policy has been assigned. The New York Court of Appeals has so declared. In Schneider *vs.* U. S. Life, 123 New York, 112, the Court holds, under the Act of 1877, as follows: "*This notice was served upon the husband* "*who had the policy in his possession, and who was* "*the agent of his wife for the purpose of receiving the* "*notice.*" This is based upon the theory that the insured is the one primarily and voluntarily responsible for the insurance, which is usually for himself or those dependent on him. The statute is thus based upon the assumption that the insured is the person who is going to pay the premiums, unless the policy is assigned.

On this point the Supreme Court of New York has said in Rowe *vs.* Brooklyn Life, 11 App. Div., 537: "No valid reason can be suggested why it was not com- "petent for the Legislature, in accordance with the

"usual practice in insurance cases, to provide that the "notice to be given should be addressed to the party "whose life is assured. It is generally understood that "the person whose life is assured, more frequently than "any other person, pays the premium to procure, as "well as the premium to continue in force the policy "issued upon his life."

The insured has full power apart from any question of notice to abandon the policy. The design of the statute requiring notice is that the *insured* shall be notified of the approaching due date of the premium so that there may be no question of his having the opportunity to pay if he desires. The object of giving notice is to warn the *insured* of the danger of lapse.

Hill actually knew when the premium was due and declined to pay it.

Hill signed an application dated April 28, 1886, which stated that the premium was payable *annually*. By the terms of the application itself this particular formed a part of the contract with the Company. The contract itself stated that the annual premium of $814 should be paid every year on April 29th.

It is well settled that the contents of a writing signed by a party himself or by another at his request are presumed to be known to him (Lawson on Law of Presumptive Evidence, p. 18), and Hill is bound by the contents of the application and policy and presumed to know them. See Travelers' Insurance Company *vs.* Henderson, 32 U. S. Appeals, 547, also Union Central Life Ins. Co., *vs.* Hook, 56 N. E. Rep., 907.

Hill did not pay in 1887, or 1888, or 1889, or 1890, after which he died. *Hill was personally solicited to pay the second premium due April 29, 1887, but could not pay it* (Rec., pp. 102, *et seq.*). He must be presumed to have intended the contractual consequences of his own act namely "if this policy shall become void for

non-payment of premium, all payments previously made shall be forfeited to the Company."

His bad financial condition in 1887 and 1888 furnish the explanation of this abandonment.

Hill received actual personal notice. The renewal receipt was itself tendered to him on more than one occasion. His acts indicate his intention. His failure to pay indicated his attention to abandon. He was solicited repeatedly to pay the second premium, and on each occasion expressed his inability to do so and thus to continue the policy in force. A notice given to him under the statute would, therefore, have been an utterly useless formality.

"It is one of the maxims of the common law, and which is a dictate of common sense, that the law will not attempt to do an act which would be in vain, or to enforce an act which would be frivolous. *Lex nil frusta facit. Lex non cogit ad vana seu inutilia.*" Trustees of Huntington *vs.* Nicoll, 3 Johnson's Reports, 506.

It is well settled in the case of replevin where a demand is necessary, that if it appears a demand would have been unavailing then evidence of the demand is not required.

So in the report of the case of The King *vs.* Bishop of London, 13 East's Reports, 419, there is a note of a case where if a certain license were granted it would have no effect. In such a case the Court would not interpose, nor command, etc., *lex non cogit ad inutilia.*

So in a case where the Court held a formal levy by the Sheriff not required because of no effect, the same maxim was applied.

So in Lent *vs.* Padelford, 10 Massachusetts Reports, 239, the Court will not require "a fruitless ceremony."

The law does not require the doing of idle and useless things.

Where there is actual notice, as in this case, the infraction of the strict letter of the law becomes trifling, and the maxim *de minimis* applies.

Since Hill was the only person recognized by the law as entitled to notice, he could accept actual notice and waive the formality of sending one by mail.

When demand for the payment was made and the renewal receipt tendered him, his conduct necessarily amounted to such waiver, and his continued failure and refusal to pay for four successive annual premium periods constituted a clear abandonment.

All the presumptions and evidence therefore establish an intention to abandon and an abandonment of this insurance, and there was not a scintilla of evidence showing a desire or intention to keep it alive.

So in Lone *vs.* Mutual Life, quoted above neglect to pay premiums for so long a time is conclusive evidence of abandonment.

Actual knowledge by the insured of the premium being due possessed and acted upon by Hill, and actual dealings respecting the payment of the premium was equivalent to serving the statutory notice if required at all in this case.

It was established as a fact by the undisputed evidence in this case that at the maturity of the premium for 1887 Hill had full notice.

We submit that any notice given, recognized and acted upon by the assured as notice, constitutes a substantial and effective compliance with the statute.

If Mr. Hill did not object to its sufficiency as notice at the time, but on the contrary accepted the same as a proper notice, those whom he represented can not now be heard to say that said notice was insufficient as a compliance with said statute.

Johnson *vs.* Oppenheim, 55 N. Y., 280, 291.
Bryant *vs.* Goodnow, 5 Pickering (Mass.), 228.

As CLIFFORD, J., held in the Desmazes case, the statute could be waived not only expressly, but impliedly, by assuming a position inconsistent with an intention to claim its benefit.

See Weymouth *vs.* Gorham, 22 Maine, 385.
York *vs.* Penobscott, 2 Greenleaf (Me.), 1.

In Johnson *vs.* Oppenheim, this principle is thus stated: "When some formal act or acts are to be performed by a party as a condition precedent to some "right, or to perfect a right of action or property, and "the act as performed is defective or imperfect, and "the adverse party whose right it is to object and insist upon a more perfect compliance with the condition, makes no objection to the manner of its performance, but accepting the performance as perfect, places "his objection to the claim and right asserted upon "another distinct and independent ground, he is held "to have waived all objection to the formal or technical "defects. The rule rests upon the ground that the "party by his silence has misled his adversary, and not "having spoken when he ought, shall not be permitted to speak when he would. The principle has "its most frequent application in actions upon policies of "insurance, where there have been some defects in the "preliminary proof of loss of interest, which have not "been objected to, but the claim has been resisted on "other grounds."

The parties to a policy of insurance by law stand upon the same footing, and the same principles of law apply to the insured as to the insurer; and if the insurer may waive rights by receiving, accepting and acting upon notices, proofs of loss, etc., defective in form and insufficient in point of time, can not the insured likewise bind himself and those whom he represents as statutory agent by the same conduct with reference to

notice required, either by the law or his contract? Certainly, it is not the law that the rights of the different parties to the same contract are to be measured by dissimilar rules and standards. The same rule should work both ways.

> "Waiver is a voluntary relinquishment or renunciation of some "right, a foregoing or giving up of some benefit or advantage, which, "but for such waiver he would have enjoyed. It may be proved by "express declaration, or by acts and declarations manifesting an "intent and purpose not to claim the supposed advantage; or by a "course of acts and conduct, or by so neglecting and failing to act as "to induce a belief that it was his intention and purpose to waive "* * * It may be proved by various species of proofs and evidence "by declarations, by acts, and by nonfeasance or forbearing to claim "or act; but, however proved, the question is: has he willingly "given up and forborne to claim the benefit of the conditions?"
>
> Farlow v. Ellis, 15 Gray, 231.

The Maine cases above cited are both cases wherein a *notice required by statute* to be in a particular form was informal; and the party receiving the same having made no objection to the form of the notice at the time of its receipt, and having acted thereon, it was held that the statute was substantially complied with, and that the notice was sufficient.

The defendant in error cites some cases in New York to show that the statutory form of notice must be followed. None of the cases touch the facts in this case, or what is the effect of receipt of actual notice and an actual response thereto, such as was made in this case.

The Court in the Phelan case expressiy held simply that the irregular notice *was never received.*

In the Carter case notice was sent to another person.

Actual notice meets the object of the statute.

The object of the premium notice statute of New York is variously stated as follows:

To prevent lapse without notice and an opportunity to pay (Baxter *v.* Brooklyn Life, 119 N. Y., 456).

Notice is intended "to remind" the insured. The statute was not meant to operate harshly upon the Company. "The obligation of the statute must not be unreasonably insisted upon" (McDougall *v.* Society, 135 N. Y., 456).

Most of the cases on this subject state that the object is simply to prevent "forgetfulness" or "misapprehension" as to time of payment.

Most of the cases where the form of notice is enquired into are cases where the company proved simply the mailing of the notice, but proved no actual notice. In such cases, of course, if the statute applies, the form may be important.

In one case, Trimble *v.* New York Life, 55 Pacific Reporter, 429, decided in the State of Washington in 1898, the question was simply on the form of notice which was mailed, and there was no question of actual notice. In stating the object, the Court says:

"While it was probably true that the law was made "for the benefit of the assured, it was evidently in- "tended as a reminder to him of the coming due of the "premium, so that he might not unawares, or through a "fault of memory, allow his policy to lapse, and forfeit "his rights under the contract, upon which he had al- "ready paid out money; and when the notice which "was sent in this case was received by the insured, it "seems clear that the object of the law was met, and that "his attention was called to the fact that the premium "was about to become due, and to the further fact that, "if it was not paid within a certain time it would be for- "feited."

* * * * *

"The evident intention of the law, we think, how- "ever, was not to apprise him of the amount which "was due, but of the time when the amount became "due. While the statute was no doubt enacted for

"the benefit of people who insured in these cases,
"the law recognizing the fact that they were not people
"who were expert or careful in transacting business,
"yet it evidently was not the intention to make the
"law operate oppressively upon the insurance compa-
"nies, but was enacted simply in the interest of justice.
"While Courts have always been ready to protect the
"assured from oppressive and technical conditions
"which are frequently incorporated in insurance poli-
"cies, and are misleading to the untrained mind, this
"provision of the law does not need any strained or ex-
"tended construction to effectuate that protection."

* * * * *

"The plaintiff has no equities in this case, and, if he
"recovers at all, it must be upon his strict legal rights.
"We think such rights have not been shown, under
"the facts proven, and that he has no just or legal de-
"mand against the appellant."

The logical result of this abandonment and the legal and business propriety of the position taken by the Company is clearly seen when we consider the nature of the contract.

Assuming the statute governed, then, had Hill had no notice whatever of the premium being due, an entirely different question would have been presented.

Upon the trial of this case the affirmative defense was made that the Mutual Life Insurance Company is a mutual life insurance association; that its membership consists of its persistent policy-holders; that the fund out of which its losses are paid is supplied from payment of premiums, and that every premium-paying policy-holder has an interest in the fund thus accumulated, out of which, in case of death, his policy is to be paid and credit is to be given him by way of deduction upon annual premiums or an increase of insurance; that out of his performance of his contract of contribution to the common fund comes the right of recovery in case of death; that the fund from which such recov-

ery is had is the property of the Company for the benefit of all the persistent members. As this Court said in the Phinney case (178 U. S., 344) the contract, "although in terms a contract with a corporation it is in substance a contract between the insured and all other members of that Company." This defense was substantiated upon the trial by offering in evidence the charter of the company, showing such to be the fact, and the testimony of witnesses to the practice of the company. The action is substantially in the nature of a specific performance; that the policy-holder having contributed by way of premiums his quota, his beneficiaries are entitled by way of distribution or contribution from fellow-members of the association, to the amount of the policy in case of death. It was shown in this case, as already stated, that but one annual premium had been paid upon the delivery of the policy; that in April, 1887, when the second annual premium fell due, the official renewal receipt for the same was tendered the insured and repeated opportunities given him of making payment all of which he knowingly and with full information failed to avail himself of, but, on the contrary, from lack of means or other private motive, declined to make the payment. As a member of the association, as well as by the express terms of his contract, he was informed that with the failure to contribute the right of recovery ended. Notwithstanding this knowledge and these facts, he continued in default through the following successive years, to the time of his death. The beneficiaries, as will be shown, neither made nor offered payment of premiums, but in the face of the confessed defaults ask contribution from the associate members of the full amount of the policy.

In any other relation the parties would have no standing for the enforcement of such a claim. Why should

it be given them in the case of a mutual life insurance company?

The Supreme Court has likened this case to a suit for specific performance. If we follow the analogies of the law of specific performance, the plaintiffs would have no standing in court, because, first, there is a lack of mutuality which is essential to such a suit. The insurance company could not have compelled payment of premiums as they fell due in the years 1887, 1888, 1889 and 1890, for the reason that there was no obligation on the part of anyone to pay such premiums. In Marble Co. *vs.* Ripley, 10 Wallace, 359, it is said:

> "Another reason why specific performance should not be decreed in this case is found in the want of mutuality. Such performance by Ripley could not be decreed or enforced at the suit of the marble company, for the contract expressly stipulates that he may relinquish the business and abandon the contract at any time on giving one year's notice. And it is a general principle that when, from personal incapacity, the nature of the contract, or any other cause, a contract is incapable of being enforced against one party, that party is equally incapable of enforcing it specifically against the other, though its execution in the latter way might in itself be free from the difficulty attending its execution in the former." P. 359.

And, second, because there has been default in payment of the premiums for these four consecutive years, and to enforce the contracts plaintiff's should show either the payment of the premiums or the valid offer of payment. On the contrary, their reply sets forth that they never paid or tendered, or caused to be paid or tendered, any but the first annual premium, and will not assert that either payment or offer of payment was made by the insured George Dana Hill. The proofs in the case are undisputed that no such payment or offer

ever was made, but on the contrary that neither payment nor offer of payment was made, but that upon repeated tender of the renewal receipt for the second annual premium, the insured, with full knowledge, failed to make such payment, and continued the failure to the time of his death.

In Kelsey *vs.* Crowther, 162 U. S., 404, it was said:

> "The action was in the nature of a bill for specific performance of a contract for the sale and purchase of a tract of land. If the contract is construed as making it the duty of Crowther to tender the abstract, yet his failure to do so did not dispense with performance or the offer to perform on the part of the complainants. His failure to furnish the abstract might have justified the complainants in declaring themselves off from the contract, and might have formed a successful defense to an action for damages brought by Crowther. But if they wished to specifically enforce the contract it was necessary for the complainants themselves to tender performance."

In Walsh *vs.* Preston, 109 U. S., 297, the court, at page 318, says:

> "The failure on the part of the party applying for it to perform his own part of a contract wholly executory, or to show any sufficient reason for the failure, has always been held to be ground to refuse relief and turn the party over to his action at law."

Third, because in no event is relief in the nature of specific performance granted except for the purpose of meting out equity and justice.

In McCabe *vs.* Matthews, 155 U. S., 550, Justice BREWER states the rule as follows:

> "A decree for the specific performance of a contract for the sale of real estate does not go as a matter of course, but is granted or withheld ac-

cording as equity and justice seem to demand in view of all the circumstances of the case."

Pratt vs. *Carroll*, 8 Cranch., 471.
Holt vs. *Rogers*, 8 Pet., 420.
Willard vs. *Tayloe*, 8 Wall., 557.
Hennessy vs. *Woolworth*, 128 U. S., 438.

It has already been demonstrated by the opinions of this Court that the notice statute of New York is neither a part of the charter, nor imported by legislative authority into every contract of insurance entered into by a New York Company; but that it is external to it, and a local legislative regulation, subject to modification or repeal, independently of existing contracts. Had the legislature entirely repealed this statute after the policy in this case was made, (assuming it applied) and before the second annual premium fell due, it could not be questioned but that the parties to the contract would be bound by the stipulations of the agreement and would have to abide the consequences of non-performance of its conditions as in the case of other contracts.

What were the obligations of the contract? Absolute upon the part of the insurance company to pay the loss —upon performance of the conditions by the insured; but upon the part of the insured there was no obligation to continue the contract. Payment of annual premiums was not undertaken by him. So long as he saw fit to exercise the privilege or right of paying premiums the company was obligated to receive them and continue the insurance. The insurance, however, was only continued on condition that premium was paid each successive year in advance. Otherwise the contract terminated, except that after three annual payments certain additional rights accrued to the insured, which need not be considered, as but one premium was paid.

By operation of law upon failure to pay the premium in advance, the contract of insurance terminates —that being the condition of the insurance. By the express stipulation of the parties also the same consequence was to follow non payment of premium. Such must be the consequences, whether the policy of insurance was a New York or Washington contract. In no event does the statute of New York interfere with or prevent these consequences. It does not purport to act upon the contract nor the legal effect of any of its stipulations. It deals alone with the insurance company, not at the time of making the contract, but subsequent thereto, and not until after a breach of the contract had occurred through nonpayment of premium. Its only operation is in restraining the insurance company from declaring a forfeiture, or availing itself of a breach of the contract after it has occurred. It places, as we contend, this restraint upon the insurance company, only in case the insured or his assignee has a known postoffice address in the State of New York. Had this contract actually been made in New York, and the insured Hill had a postoffice address in that state, these facts, under the well established rule of the Supreme Court of the United States, would not prevent the lapsing or terminating of the contract by mutual consent, or the conduct, omissions or default of the insured as in any other contract. When the second annual premium became due and the renewal receipt was presented to the insured, *he* then became the actor to continue or destroy this policy regardless of the New York statute when some one else paid on account of the children. He assumed this responsibility. He failed and neglected or declined to pay the premium and accept the renewal receipt. In doing so he knew the contract was by his course of conduct terminated unless some one

else paid. The insurance company possessed no coercive power over him to keep it alive. It exhausted its powers of persuasion in vain to have him continue the contract. Upon the failure to pay the premiums it entered the policy upon its books as lapsed and terminated. He never repented his course, or sought a restoration or renewal of the contract during the three following years of his life. In the language of the Supreme Court in the Sears case: "There is nothing in the New York statute (if controlling at all) to prevent the parties from dealing with that as any other contract, and if they chose to abandon it, that action is conclusive". 178 U. S., 347.

It is to be remembered that in this case the insured himself made the application for the insurance; the contract was between him and the company; the premium paid, was paid by him alone; to him was delivered the policy, and in his possession it remained.

Under such state of facts, we think the following conclusions must be accepted:

There was no obligation on the part of Hill to pay premiums longer than he wished, and the beneficiaries had no contract right to require the insured to make payment.

The insurance company by the contract and the statute, if applicable, dealt solely with the insured. If the insured failed or refused to make a payment at the due date, the contract was terminated unless the beneficiaries or some one in their behalf stepped forward and paid.

No one paid on behalf of the children.

It is wholly immaterial who the beneficiary may be whether a third person not wife or children, or wife or children, so far as the question of notice is concerned. We are dealing only with the question of

statutory notice to the insured, who was the statutory agent of the beneficiaries to receive the notice (Schneider *vs.* Co., 123 N. Y., 109). The wife or children, beneficiaries, cannot recover when the premiums have not been paid. It is not a question of the company preventing them from paying or preventing any one in their behalf from paying. The company, under the premium notice statute, owed no obligation to beneficiaries. The obligation, if any, was to Hill alone. If so, it follows that Hill was without excuse for non-performance, and his non-performance had its full effect, namely, termination of the policy, no one else coming forward.

This principle is illustrated by the recent cases in Wisconsin (Ellison *vs.* Straw, 116 Wis., 215, 1903, 92 N. W., 1094), where the Court, in speaking of the married woman's statute, "Lastly, the whole scope of the statute shows that the purpose thereof was that a policy of insurance made upon the life of a person for the benefit of a married woman, the policy being kept in force, shall be to all intents and purposes her property, *free from all interferences, save, of course, forfeitures*, under the conditions of the policy." The same principle is stated in the later case of Behling *vs.* N. W. Nat. Life Co., 93 N. W., 800, where the Court says:

"The further point is made that plaintiff had a vested interest in the policy which cannot properly be prejudiced without her consent by any act of her husband. The rule invoked has no application to acts of the assured causing a forfeiture of his policy, according to the stipulations thereof. That was recently suggested in Ellison *v.* Straw (Wis.), 92 N. W., 1094. The question was only passingly referred to, because it did not seem to be one open to serious controversy. *Of course, whatever interest a married woman has as beneficiary under a*

policy of insurance is subject to the provisions of the insurance contract as regards forfeitures."

The sole excuse the children of Hill urge for non-payment of premiums is that statutory notice was not served on Hill, their statutory agent, although he had full actual notice; but this failure to serve a technical statutory notice did not in any way prevent the children from paying or causing the premiums to be paid. In the case of Wheeler *vs.* The Connecticut Mutual Life Insurance Company, 82 N. Y. Appeals, 543, the policies had been assigned by Vose to his children, for whom he was general guardian. Vose became insane. This was held not to relieve the children.

"Although Vose was their guardian, if incapacitated
'by his insanity, a competent person could have been
"appointed in his place; and hence his insanity was
"not necessarily an insuperable obstacle to their per-
"formance of the condition of the policy, and they
"were not relieved thereby" (p. 550).

The insured stands as principal so far as he is the only person with whom the insurance company had to deal under the statute, if it applied; but if it should be contended that the beneficiaries are the principals and the insured their agent in matters relating to premiums, then the insured's relation to the matter of the statutory notice is that of a general agent clothed with full power; and whether the beneficiary is a person of capacity or laboring under incapacity, in claiming the benefits of the policy he must be bound by the actual notice to his general agent and the latter's failure to pay the premium. If the insured, as general agent, was guilty of such conduct in failure to pay as would preclude him from recovering on the expiration of a term policy payable to himself, his beneficiary, whether over or under age, cannot recover upon like policy, for such representations

and conduct will bind him also, and this, we think, in the nature of things, must be the universal rule, regardless of the capacity or incapacity of the principal. If a guardian or other person represents the infant beneficiary in asserting a claim to the insurance under such circumstances, he steps in the shoes of the insured.

If the beneficiaries maintain that the Company is endeavoring to obtain the benefit of admissions or declarations of the insured against them, then it may be said that it is a rule of evidence that admissions are not admissible unless made by a party to the litigation or by someone identified in interest with a party. The plaintiffs thus assert that the insured is not identified with them in interest and at the same time take the inconsistent position that the insured is so identified in interest with them that the statute requiring that notice be sent to him enures to their benefit and that the insured cannot receive actual notice and fail to pay the premiums so as to bind them.

In Klein *vs.* Insurance Company, 104 U. S., 88, a policy of insurance was issued upon the life of one Frederick W. Klein, payable to his wife, Clara Klein. One of the conditions of the policy was that if the stipulated premium should not be paid on or before a certain day the policy should case and determine. A semi-annual premium due in March, 1871, was not paid. The wife alleged as a ground of relief that the policy was taken out by Frederick W. Klein without her knowledge ; that she had received no information of its terms or conditions until after his death ; that about February 1 he was taken down by the illness from which he died, and that on account of his condition he was incapable of attending to any matters of business whatever, and for that reason failed to pay the premium when it was due. The bill was dismissed in the lower Court, and on appeal this Court affirmed the decree.

Mr. Justice WOODS, in the opinion (page 92), states:

> "She (the wife) was never incapacitated from making payment. The alleged fact that she had no knowledge of the existence and terms of the policy does not relieve her default. If the fact be true, her ignorance resulted from the neglect of her husband, who, in respect of this contract of insurance, was her agent, in not informing her about the insurance on his life and the term of the policy. The bill is therefor an effort by her to obtain relief in equity against the appellee from the consequences of neglect of her own agent."

Knickerbocker Life Insurance Co. *vs.* Pendleton and others, 112 U. S., 696, was a case where a policy of insurance was issued on the life of one Samuel H. Pendleton for the benefit of the plaintiffs as the children of the said Samuel H. Pendleton. The policy was conditioned to be void if the annual premium, or any obligation given in payment thereof, should not be paid at maturity. The annual premium due in July, 1871, was paid by a foreign bill drawn by the insured, with the condition that the policy should be void if the draft was not paid at maturity. The bill was presented and not accepted, on account of want of funds in the hands of the drawee.

In the opinion, at page 708, Mr. Justice BRADLEY says:

> "The drawer (Pendleton) who took entire charge of the policy for his children, put its existence on the condition of the payment of the draft at maturity; and it was his business, as agent or guardian of his children, to see that the draft was thus paid, that the requisite funds were in the hands of the drawee, or that they would pay it, whether in funds or not."

In Miles *vs.* Connecticut Life Ins. Co., 147 U. S., 177, the insurance company issued a policy for $5,000 upon the life of John S. Miles for the sole use and benefit of Sarah G. Miles, his wife. It was at the instance of the insured that the policy was issued and he paid with his own money all of the premiums. Before the tenth premium became due the insured advised the company that he could not pay that premium and wished a paid-up policy. The company advised him not to do so, but to have so much of the $5,000 released as would enable him, with the sum allowed for such release, to pay what would be due as a premium on the remainder. This was agreed to, and a receipt was presented by him, signed by his wife, for $82.39, as a consideration for the release of $700 of the $5,000, the $82.39 being applied towards a premium on the $4,300. Thereupon the husband received a policy for $4,300 on his own life for his wife's benefit. Subsequently he took a paid up policy for $1,195 in the same favor, having given what purported to be a receipt signed by the wife. It appears that the wife's name on both receipts was signed by the husband without her assent. In suit on the $5,000 policy brought by the wife the company set up non payment of premium.

The court held that it was a good defense, and that there was nothing to justify the failure to pay the premium.

In Schneider *vs.* U. S. Life Insurance Co., 123 N. Y., 109, above quoted, the court held that a married woman in whose favor a policy of insurance was issued upon the life of her husband could not claim the benefit of the insurance without at the same time assuming all the responsibility of a failure to perform its essential conditions, among them being the payment of premiums.

In the opinion of O'BRIEN, J., at page 114, it is stated:

"The husband had the possession of the policy and in dealing with the defendant in regard to it was treated as plaintiff's agent, and the rule that when one of two innocent parties must sustain a loss from the fraud of a third, such loss shall fall upon the one whose act enabled the fraud to be committed applies to this case."

See also

Manhattan Life Ins. Co. *vs.* Smith, 44 Ohio State, 156.

In Baker *vs.* The Union Mutual Life Ins. Co., 43 N. Y. Appeals, 273, the Court says:

"The case will not be changed if the policy is regarded as having been procured by the plaintiff, and as the result of an agreement made between her and the defendants. The husband of the plaintiff was the actor in the transaction, and represented the plaintiff; and claiming the benefit of his acts and of the policy procured by his agency, she necessarily ratifies and affirms the contract as it was made, with all its terms and conditions. She adopts the acts of the agent and makes them her own. (Elwell *vs.* Chamberlain, 31 N. Y., 611; Bennett *vs.* Judson, 21 *id.*, 238). If the agent exceeds or transgresses his authority, the principal may repudiate his acts altogether, but cannot affirm in part, and repudiate in part, take the benefit of the favorable parts of a contract and reject the residue."

In Whitehead *et al. vs.* New York Life Ins. Co., 102 N. Y., 143, a husband procured a policy of life insurance upon his own life for the benefit of his wife, or, in case of her death before his, of their children. Held, that the husband had no authority without the assent of the assured to surrender the policy, such an act not being within the scope of the agency inferable from the taking out of the policy by him; but where such a policy by its terms has become forfeited for failure to pay

premiums, the husband may thereafter, in consideration of a sum paid, surrender it. In such case the forfeiture is not waived by the surrender and the assured could not repudiate the surrender and at the same time assert the revival of the policy under it.

FINCH, J. (p. 150):

> "He (the insured), therefore, in procuring the policies to be made, in paying the premiums, *in receiving and acting upon notices* and in doing whatever was necessary to perfect and continue the rights of the assured, must stand in the attitude of an agent, acting and representing the assured, and as having no interest in the policies, unless, possibly, after the death of all of the assured."

Holmes *vs.* Gilman, 138 N. Y., 369, 381, 382, is to like effect.

There are many circumstances under which the beneficiary is bound by the acts or omissions of the insured, and examples of these are the following:

The beneficiary is bound by insured's breach of condition.

Hopkins *v.* N. W. Life, 94 Fed., 729. (Implied condition that insured will not commit suicide.)

Hopkins *v.* N. W. Life, 99 Fed., 199. (Express condition against suicide.)

Ellison *v.* Straw, 92 N. W., 1097. (Quoted above.)

Behling *v.* N. W. Nat'l, 93 N. W., 803. (Quoted above.)

Seitzinger *v.* Mod. Woodmen, 68 N. W., 478. (Suicide.)

Evans *v.* U. S. Life, 64 N. Y., 304. (Residence.)

Hanna *v.* Conn. Mut., 150 N. Y., 526. (Intemperance.)

Douglas *v.* Knickerbocker, 83 N. Y., 492. (Travel on sea. Tweed.)

Schneider *v.* U. S. Life, 123 N. Y., 109. (Fraudulent surrender of policy and lapse.)

Knapp *v.* Homœopathic Mutual, 117 U. S., 411. (Fraudulent surrender of policy and lapse.)

Hathaway *v.* Trenton Mutual, 11 Cush., 448. (Travel restriction.)

The beneficiary is bound by Insured's failure to pay premiums.

Union Central *v.* Buxer, 62 Ohio, 391.

Britton *v.* Mutual Life, 12 Daly, 164.

Beneficiary is bound by Insured's breach of Promissory Warranty.

Mutual Life *v.* Kelly, 114 Fed., 278. (Suicide.)

Schultz *v.* Mutual Life, 6 Fed., 672. (Intemperance.)

Davey *v.* Ætna Life, 20 Fed., 482. (Intemperance—Verdict for Plaintiff.)

Beneficiary is bound by Insured's waiver of statutory right to extended insurance.

Caffery *v.* Ins. Co., 27 Fed. 25.

Beneficiary is bound by Breach of Affirmative Warranty and by misrepresentation committed by insured (i. e., untrue statements in application).

Burruss *v.* National Life, 96 Va., 543.

Beneficiary is bound by Fraud of Insured.

Summers v. Metropolitan, 90 Mo. Ap., 700.
Phœnix v. Willis, 70 Tex., 12.

To sum up. In the Hill case the children sue because it became payable to them upon their mother dying. No added difficulty arises from the fact that this policy is payable to other persons than the insured as beneficiaries. It is well settled that in all matters connected with the making of the application and the taking out of a policy the insured acts as the agent of the beneficiary, who is bound by the statements and the conduct of the insured. Similarly, for all matters connected with the payment of the premium and the receipt of any statutory notice with respect thereto, the insured must be considered the general agent of the beneficiary. The insured as applicant is the person who determines how and when the premium is payable and who is expected to pay the premium and who generally actually does pay the premium. That is the theory on which the statutory notice is based. The scheme of the contract makes no provision for payment of the premium by anybody but the insured. But statutory notice must be sent to the *assignee* if the policy is assigned. That is, the insured represents everybody, unless the policy is *assigned*. This is conconclusive upon the question here before us. The statutes with regard to the sending of premium notices relate primarily to the sending of notices to the insured—not to the beneficiary. It has been held that the insured is under no duty to the beneficiary to pay the premiums and keep them up. Remembering that the statute contains no provision for sending notice to the beneficiary and confers no right of forfeiture upon the company if the notice be sent to the

beneficiary, it seems clear that in all matters connected with that notice the insured must be regarded as the representative and agent of the beneficiary as decided by the New York Courts in the Schneider case. The statute is designed not to jog the memory of the beneficiary, not to guard against the negligence or want of business promptness and the attention of the beneficiary, but to deal in these matters simply with the insured. This doctrine is expressly sustained by the Lone case and inferentially by the Phinney case. When the insured, as in these cases, refuses to pay a premium, elects and makes known his election to the company to allow the results of such failure to take place, and subsequently for many years does not pay any premiums, the company is lulled into security and the belief that the insured has abandoned the policy.

4. *Even if the statute otherwise would control, still the statutory notice was waived not only by special agreement in the policy, but also by Hill, the statutory agent to receive the notice, in that he received actual notice and did not insist upon the technical statutory notice.*

We have heretofore shown that the claim, that the laws of New York governed by convention of the parties by reason of the special clause as to where the contract was made, must involve a concession on the part of Hill's counsel that the parties had the right by the same convention to exclude the operation of the premium notice law. In view, however, of the claim made that the premium notice law notwithstanding this agreement applies, and that Hill himself could not receive actual notice and waive the statutory notice, it is necessary for us, at the risk of unduly lengthening this brief, to remind the Court that in the previous cases it has decided that the parties in-

terested could waive. This appears from the following statements:

In the Phinney case this Court stated that it assumed, without deciding, that the law of New York did control in respect to that contract. The Court then went on to hold that Phinney's executrix could not recover, which necessarily involved the waiver.

And in the Sears case this Court says: "As we held in the prior case, there is nothing in the New York statute (if controlling at all), to prevent the parties from dealing with that as any other contract, and if they choose to abandon it that action is conclusive."

Notwithstanding these statements by this Court the matter is brought up again by opposing counsel so that it is incumbent upon us to bring before the Court the argument on the subject of waiver heretofore presented to this Court with such modifications as subsequent decisions have made.

This notice statute was one which could be waived not only when this contract was entered into, but by Hill the statutory recipient of the notice.

From a practical point of view, there is no objection to this contract of waiver. The Court can almost take judicial notice of the fact that in modern times it is the practice of companies not only to give preliminary notice, but second notices, and oftentimes default notices. The modern struggle is to keep contracts alive. The premium notice statute is a relic of the dark ages of insurance. The paid-up statute of New York which gives the *quid pro quo* where a policy holder defaults has been copied elsewhere, but the notice statute *never*, as applying to old line companies. One has only to examine the premium notice cases which have been decided in some State Courts, to see how it has been

used as an oppression to honest persistent policy holders.

It has been shown above that the fact of the agreement of waiver having been made in the policy indicated that the New York law could not govern, if opposing counsel claim, that under New York law the statute could not be waived.

No Circuit Court of the United States has ever decided that this statute cannot be waived except the Circuit Court of Appeals, in a different case, from which this appeal is taken. In the case of Equitable Life *vs.* Nixon, 81 Fed. Rep., 736, the same Court, per Ross, C. J. (where the question arose not on a contract of waiver in the policy, as in this case, but upon facts discussed below), said: "The statute is mandatory and controls the contract." Quoting cases discussed hereafter. The above is simply a dogmatic statement of the law. "The statute is mandatory", the Court says, but the statement is supported by no reasoning. Besides in the Nixon case the contract was confessedly a New York contract having been issued upon what is known as a "binding receipt" making the contract take effect in New York.

Hill accepted as the contract by which the rights of the beneficiary were to be determined a policy which, by its unmistakable language, dispensed with the necessity of the insurer giving any notice required by any statute. It was entirely competent for the applicant, as we have shown above, to make a contract by which rights, conferred upon him as the statutory agent of his wife and children, by this statute could be waived, if it otherwise would apply. See cases cited a few pages prior to this on beneficiary being bound by the contract as made.

This statute was passed solely for the benefit and protection of the individual in his private capacity, and

could be dispensed with without infringing on any public right or public policy. The public policy of the State would be in no way contravened by its waiver. The person entitled to notice could, therefore, by contract waive the benefit and protection of its provisions.

Caffery vs Ins. Co., 27 Fed., 25.
Desmazes vs. Ins. Co., 7 Ins. Law J., 926; s. c., 7 Fed. C., 529; case No. 3821.
Ins. Co. vs. Curry, 13 Bush., 312.

The Caffery case above cited is worthy of more than passing consideration. The decision was rendered by Mr. Justice Brown, now of this Court. The principles decided are applicable to the case now before the Court, and so far as counsel are able to discover, have never been contravened, except by the single California case of Griffith, the reasoning of which is opposed to the uniform current of authority.

The statute of Massachusetts passed in 1861, provided, that no policy of insurance hereafter issued by any company chartered by the authority of the Commonwealth shall become void or be forfeited by the nonpayment of the premium thereon, etc., "*anything in the policy to the contrary notwithstanding.*" (This clause is also in the Missouri statute construed in the Wall case, and in the Iowa statute construed in Mutual Benefit *vs.* Robinson, 54 Fed. Rep., 580).

The John Hancock Mutual Life Insurance Company, chatered by the Commonwealth of Massachusetts, issued a policy containing, *inter alia* this provision: "It is hereby agreed that every person accepting or acquiring any interest in said policy waives the benefit of Chapter 186 of the Laws of 1861 of the Commonwealth of Massachusetts."

Suit having been brought upon this policy, the plaintiff insisted that the provisions of the statute could not be waived. Judge BROWN, in discussing this contention,

at page 28, says: "We think, however, that a party may waive the benefit of the statute, The words 'anything to the contrary notwithstanding' in our opinion were intended to apply to the ordinary form of policies which provides that there shall be a forfeiture if the premium be not promptly paid; but if the parties choose to adopt any other form of policy which shall be non-forfeitable, we think it within their power to agree that this form shall be substituted for the statutory form, and that the statute may thus be waived by the express agreement of the parties."

The Desmazes case has never been overruled. In the case of Holmes *vs.* Charter Oak, 131 Mass., 64, the point as to waiver was not alluded to in any way.

The Desmazes case above cited was based upon the same statute of Massachusetts and Justice CLIFFORD of the Supreme Court, sitting at Circuit, rendered the decision, holding that the statute *being made for the benefit of the insured*, could be waived by him, not only expressly *but impliedly, by assuming a position inconsistent with an intention to claim its benefit*, which is what Hill did, saying: "Contracts in general will not "usually have the effect to modify the statute, but to "this rule there is a large class of exceptions

"Cases often arise where a party is at liberty to "waive statutory provisions in his favor, and Mr. Sedg- "wick lays it down as a general rule, that where no "principle of public policy is violated, parties may "waive the provisions of a statute which, if fulfilled, "would operate in their favor, and that proposition is "fully sustained by many other authorites. * * * "When the parties undertake in the policy itself to "declare the meaning and effect to be given to its stip- "ulations, they have a right to do so, except in cases "where there is some provisions in the statute to in-

"dicate an intention on the part of the legislature to "control the action of the parties in that respect."

In the case of Insurance Co. *vs.* Curry, above cited, the statute provided that all statements in applications for policies should be deemed representations and not warranties, and that misrepresentations should not where not material or fraudulent, prevent recovery. The Court held that parties could contract contrary to the statute. "No principle of public policy is involved in a case like this, and when a party chooses by his or her contract to stipulate that parts of it shall have a construction and effect different from that the law would give to it but for their contrary declaration in the contract itself, it ought to be interpreted by the Courts as they have contracted it shall be interpreted."

Where the legislature intends that a provision as to notice shall not be waived by the parties, an express enactment to this effect is usual, *but there is no such enactment in the New York premium notice statute.* Thus in Iowa, by Chapter 210 of the Laws of 1880, it is provided that fire insurance companies shall not declare policies forfeited or suspended for non-payment of notes, unless a thirty-day notice is given, "anything in the policy or application to the contrary notwithstanding."

It is a rule of universal application that statutes made for the benefit of a particular individual, or for a particular class of individuals, and which do not concern the public as a whole, may be waived by the individuals for whose benefit they were enacted.

Mr. Endlich, "Endlich's Interpretation of Statutes," Sec. 444, says: "Another maxim which sanctions the non-observance of a statutory provision, is that *cuilibet licet renuntiare juri pro se introducto.* Everyone has the right to waive and to agree to waive, the advantage of a law or rule made solely for the benefit and protection of the individual in his private capacity and which

may be dispensed with without infringing on any public right or public policy."

In the case of Warner *v.* Association, 100 Mich., 160, the Court discussed a statute relating to *assessment* companies, as follows:

"Fixed premiums, payable bi-monthly or otherwise, "are incidents of regular life policies. Assessments are "essential incidents of co-operative associations organ- "ized under this statute, *and notice through some med- "ium is requisite.* The statute relating to assessment "companies does not undertake to fix the time for a "notice, but it does fix and determine what the notice "must contain. The statute contemplates that through "these notices the policyholders shall be advised of the "cause and purpose of the assessments." The statute involved in this Michigan case was, therefore, fundamentally different from the one claimed to be applicable to the case at bar. In the Michigan case the premium was wholly undetermined at the time the contract was made. The premium was "for such an amount as the associa- "tion may deem requisite for the prompt payment of all "losses in the department in which this policy is issued "and for the proper maintenance of the contracts in "said department, including an amount for expenses as "hereinafter provided" The fundamental principle of the contract requires that the policyholder should only pay a certain determinable amount but uncertain till he received his notice, and it was contrary to said principle to require him to pay an *arbitrary* amount as he would be if he was not notified of the cause, etc.

In the subsequent case of Hermany *vs.* Life Association, 151 Pa. St., 23 (1892), the Court said that the Pennsylvania Act of 1885 in relation to warranties of immaterial facts effected a change in life insurance contracts, and that "the evident purposes of this legislation was to strike

"down in this class of cases, literal warranties so far as "they may be resorted to for the disreputable purposes "of enforcing actually immaterial matters. It pro- "vides a rule of construction for the purpose of pre- "venting injustice; and it is as much the duty of "Courts to enforce such rules as it is to administer the "statute of frauds and perjuries." The waiver was held contrary to public policy of Penn. To this class of statutes belongs that in Ins. Co. *vs.* Pollard, 26 S. E., 421. The same principles do not apply to the statute at bar. There is no such element in the premium notice law. Whatever the rule might be if he had no notice, yet if he had actual notice as Hill had the statutory notice is immaterial.

This Pennsylvania statute belongs in this respect to the same class of statutes as the surrender value statutes which obtain in several States as in Missouri, and which provide in substance that after a certain number of premiums have been paid, the policyholder is entitled to temporary or paid-up insurance, provided he surrenders his policy and demands the benefit of the statute within six months; but this insurance statute says "anything in the policy to "the contrary notwithstanding", and that is an implied prohibition against waiver. In the Clement case it was a surrender value statute which was under consideration. All this is foreign to the New York notice statute. *New York has its surrender value statute, which protects against the injustice referred to.*

Yet even the New York surrender value statute expressly allows its provisions to be expressly waived, if waiver is in red ink on the policy, putting that statute on the same footing as we claim the premium notice statute is, namely, non-observance of such a statutory provision, is governed by the maxim, *cuilibet licet renuntiare juri pro se introducto.* Every one has a

right to waive and to agree to waive the advantage of a law or rule made solely for the benefit and protection of the individual, in his private capacity, and which may be dispensed with without infringing on any public right or public policy.

Mr. Sedgwick (Sedgwick's Construction of Statutory and Constitutional Law, 2d Ed., p. 86) says: "The general rule is that a contract or agreement can modify a law. * * * These are cases where a party is held at liberty to waive statutory provisions, which, if insisted on, would inure to his benefit and generally it is true that where no principle of public policy is violated parties are at liberty to forego the protection of the law. * * * It has been said in New York, 'a party may always waive a right in his favor created by statute the same as any other.' * * * The general rule holds good as well in regard to constitutions as to statutes. A party may waive a constitutional as well as a statutory provision made for his benefit. * * *"

Mr. Cooley (Cooley's Constitutional Limitations, 6th Ed., p. 214), says: "Where a constitutional provision is designed for the protection solely of the property rights of a citizen, it is competent for him to waive the protection, and to consent to such action as would be invalid if taken against his will."

In Phyfe *vs.* Eimer, 45 N. Y., 102, Judge RAPALLO, delivering the opinion of the Court, says: "One of full age and acting *sui juris* can waive a statutory, or even a constitutional provision in his own favor, affecting simply his property or alienable rights, and not involving considerations of public policy."

See also Buel *vs.* Trustees, 3 N. Y., 197.

So it has been held that the debtor may waive a statute of limitations made for his benefit.

Sanger v Nightingale, 122 U. S., 183.
Webber vs. Williams College, 23 Pickering, 302.
Buswell on Lim and Ad. Poss., Sec. 49.

Also, parties may waive the right declared by statute of assignees of life, fire, &c., insurance policies to sue in their own name.

Insurance Co. vs. Lupold, 101 Penn. St., 111.

An adjacent land owner may waive his rights under an act requiring a railroad company to fence.

Ry. Co. vs. Decker, 2 Watts, 343.

If the policy would have been otherwise controlled by the terms of the New York statute, can it be doubted that the privilege of notice conferred by this statute upon Hill was waived by the express terms of the contract?

The general public could have had no concern in a private contract between Hill and the plaintiff in error. However favorable or unfavorable the terms of that contract might have been, the public welfare was in no way affected thereby. Hill as the statutory agent to receive the notice on behalf of all, had a right to claim the benefit of the protecting provisions of the New York statute, if it be applicable; and he had an equal right to contract for the waiver of the benefit thereof. He did waive them in clear and express terms, showing his intention so to do, and the learned Court below committed reversible error in refusing to so construe the contract as to give effect to the plainly expressed intention of the contracting parties.

In Keller *v.* Home Life Insurance Co., 95 Mo., App. 637, the Court in speaking upon the question, whether the statute prohibiting physicians from testifying as to information obtained in their professional capacity could be waived, said:

"The question is whether such a waiver may be made in advance, as in this instance, so as to be binding on a beneficiary of the contract other than the party making the waiver.

"The general rule is, that a party may waive for himself, at least, a right or privilege conferred by law for his benefit where such waiver does not conflict with any principle of public policy. Thus one may waive in advance the benefit of the lien conferred by the statutes concerning mechanics' liens. (Sanders Brick Co. *v.* Barr, 76 Mo., App. (St. L.), 380). An indorser, likewise, at the time of his endorsement may in writing waive presentment and notice of dishonor of the paper to which he became a party. (Maddox *v.* Duncan, 143 Mo., 612; Wilkie *v.* Chandon, 1 Wash., 355; Story, Bills, Sec. 320). * * *

"If the patient himself may make such a waiver in advance, as seems in accord with principle, we do not see why he may not make such a waiver an element of his contract of insurance, and having done so the waiver will be binding on all who come within its terms. Here the waiver is expressly designed and expressed to include "any person who shall have, or claim any interest in any policy issued hereunder'. A beneficiary in a policy is bound by the other valid and legal stipulations entered into by the insured, and is even liable to be defeated by fraud on the part of the latter in which the beneficiary had no part. Carpenter *v.* Ins. Co., 1 Story, 57; Burrus *v.* Life Ass'n, 96 Va., 543. If the waiver is a valid part of the stipulations of a policy, as we construe it to be, we consider it binding on all persons who claim under the policy."

The question of waiver of the provisions of this statute have never been adjudged by any decisions except in the Nixon case, above referred to, and the case of Griffith *vs.* New York Life Ins. Co. (101 Cal., 627),

cited in the Nixon case, wherein the decision was adverse to the contention of plaintiff in error. This Court, however, is unhampered by any binding adjudication, and indeed as we claim the right to waive is implied in the cases already decided, and we submit for its consideration that the Griffith case is outweighed by the authorities heretofore cited, both in the reasoning by which the conclusions are reached and in the authority of the Courts rendering the same. The same may be said of the case of Warner *vs.* National Life, 100 Mich., 157, construing a different statute. This Court can hardly err in adopting as its own the conclusions reached by such jurists as Justices Brown and Clifford.

Both the Caffery and Desmazes cases are cited by the California Court with apparent approval, but that Court attempts to distinguish between the language of the New York and Massachusetts statutes. It is difficult to conceive any distinction in meaning between the language used in the New York statute, "No life insurance company * * * shall have power to declare forfeited or lapsed any policy," etc., and that used by the Massachusetts statute, "No policy of life insurance * * * shall be forfeited or become void," etc. (Revised Statutes, Mass., 1892, p. 717, sec. 159). It is, to say the least, hypercritical to draw a distinction between a statute which declares that a company shall not do a certain thing, and one that declares it shall not have power to do that thing. Can it be doubted that both Legislatures had in view the same purpose? It is also noticeable that both statutes use the expression, "anything in the policy to the contrary notwithstanding," which, under the authority of the cases relied upon by plaintiff in error, means nothing more than this, that a forfeiture shall not be had, even though contracted for by the express terms of the policy, and does not in any

way refer to mere question of notice and does not inhibit the parties from contracting to waive the statute as to notice.

It will be noted that the facts upon which the Supreme Court decided the case of Ins. Co. *vs.* Clements, *supra* (cited in the Nixon case), that the provisions of the statute of Missouri could not be waived, are entirely lacking from this case. In that case the Circuit Court of the United States sitting in the Western District of Missouri, held that by reason of the public policy of the State of Missouri, a waiver of the statute of that State relating to the forfeiture of life insurance policies, could not be made, even by the express agreement of the parties. This case was one in which the Federal jurisdiction depended upon the diverse citizenship of the parties. The Federal Court in such a case adjudicates the rights of the parties, precisely as should a tribunal of the State in which it is sitting.

Pritchard *vs.* Norton, 106 U. S., 124 (129).

The public policy of the State of Missouri, was, therefore, binding upon the Federal Court, which decided the Clements case. No public policy against waiver has ever been declared by the highest Court of New York. The case of Strauss analyzed by us just below is not contrary.

A strict limit is drawn by the Constitution of the State of New York over the power of the Legislature to interfere with the right which a man has to make any contract he chooses which is not forbidden by law. The liberty which is guaranteed by the Constitution is not merely freedom from physical restraint, it is freedom from interference with his right to pursue any honest calling and to make any honest contract. *In re* Jacobs, 98 N. Y., 107 ; People *vs.* Marx, 99 N. Y., 377. In the absence, then, of fraud, duress or imposition, every man

in the State of New York, and also in the State of Washington, is free to agree to waive rights. It is his privilege to grant away that right which the Legislature has given him or which the Constitution guarantees him. He may, for instance, waive the right of trial by jury. If it be true that he can waive such a grave constitutional right as that, which is the expression of the ultimate policy of the law, not only of the State, but of the nation, can it be said that he has not the right to waive the service of a notice of the time and place of the payment of an indebtebtness? An endorser on a bill of exchange may waive the legal incidents of protest and notice of non-payment, and yet leave all the other incidents of the bill unaffected and its obligation of payment undisturbed; and he may make this stipulation on the bill itself when he endorses it. So the maker of a promissory note may, in the very contract itself, waive demand for payment. There is nothing better established in the law than that the endorser of a bill or note is liable to pay it, if it is not paid by the party primarily liable; and yet the liability may be waived by the acceptance of such an instrument with the words, "without recourse" written over the endorsement. So the benefit of exemption and stay laws may be waived.

Daniel on Negotiable Instruments, Sec. 61.

This rule of the right to contract is universal, excepting only where it is the policy of the law that certain liabilities to the public at large by one who is engaged in a public business shall not be waived by contract. Thus a common carrier or an innkeeper shall not contract against the liability for his own negligence; and yet even this doctrine is yielding to modern influence.

Sir George Jessel says in Printing Co. *vs.* Sampson, 19

Eq. Cas. L. R., 462.: "There is one thing, which more than anyother public policy requires, and that is that men of full age and competent understanding shall have the utmost liberty of contracting, and that contracts when entered into freely and voluntarily shall be held good and shall be enforced by courts of justice."

If the parties had the power to contract that the laws of New York should govern this contract, they certainly had the power to declare at the same time how far said contract should be subject to said laws, and to waive any particular law of New York, or any portion of any statute of that State.

None of the decided cases holding that this statute cannot be expressly waived are either well considered or binding upon this Court.

There is nothing in the case of Strauss *vs.* Union Central Life Ins. Co., 170 N. Y., 349, contrary to what is claimed by us in this case. In the Strauss case the company was an Ohio corporation, the policy was applied for, issued and delivered in New York, and the residence and Post Office address of both Levy, the insured, and Strauss, the assignee, were in New York. The contract was, therefore, dominated by the statute, not by the convention of the parties, but by the fact that it came within the territorial operation of the statute.

The opinion of the Court below was affirmed by a divided Court, three Judges dissenting from the opinion.

The situation is entirely different from the Hill case, where the statute, if applicable at all, *depends entirely upon the agreement of the parties*. and, being so dependent, is subject to waiver of notice by Hill or an equivalent actual notice.

The Strauss case is also clearly distinguishable from the case at bar in the following respects:

The facts of the Strauss case made a strong appeal to the Court's sense of justice. The policy required the payment of *only* ten annual premiums in all. Six of these had been paid and a part of the seventh was actually paid on or before the date it was due. The Insurance Company in the Strauss case sought to exercise an *absolute forfeiture*, the policy not providing for any paid-up or extended insurance in case of non-payment of a premium note. In the case at bar, only one premium was ever paid and under the universally recognized principles of the science of life insurance, there was no reserve belonging to the policy which the insured or beneficiary could claim.

In the Strauss case the Company sought to confiscate a very valuable contract. In the case at bar the beneficiaries are demanding something for nothing.

In the Strauss case there was no express waiver of the statutory notice and the court merely declined to find that the insured had waived such notice by *implication*.

In the Strauss case the plaintiff was an assignee who had given value for the policy. In the case at bar the beneficiaries never gave anything of value to the company. The beneficiary must bear the legal consequence of the statutory agency, *i. e.*, acceptance of actual notice as a substitute for statutory notice and waiver of the statutory notice.

In the Nixon case, 81 F. R., 802, *there was no contract of waiver in the policy*. The waiver relied on was one after the premium became due. The Court said "The statute is mandatory and controls the contract." and refers to the *Clements* case, the *Hicks* case, the *Griffith* case, and the *Warner* case. This statement of the law is simply dogmatic. No reason of any kind is assigned. The statute is simply declared mandatory. The

Trimble case (83 F. R., 85) in the same circuit simply followed the Nixon case.

The Clements case was not upon this statute.

The Rosenplaenter case (96 F. R., 721), had no question in it of waiver of any statute or stipulation to waive a statute.

In the Hicks case (60 F. R., 690) also there was *no agreement of waiver in the* policy, and no claim that *sending of notice* had been waived. The claim by the plaintiff was that there had been such a course of dealing that the assured was authorized to suppose that payment of the premiums within a reasonable time after the day of payment would be satisfactory to the defendant. The case is no authority that the statute cannot be expressly waived.

In the Griffith case (101 Cal., 627) there was an express agreement to waive. The Court held that the notice was a matter of public policy, because of the phrase in the statute "No * company * * shall have power." The statute does not say that the notice shall not be waived. Suppose the statute had read "No * * company * * shall have power, etc., * * unless sending notice expressly waived." There would have been nothing inconsistent in this. The Court obviously lays an undue stress on the word "power," which has no special significance, and as has been shown elsewhere, has been eliminated from later statutes. The Court adds: "The rea- "sons for such a policy are so numerous and obvious, "that it is not deemed necessary to occupy time. "and space in specifying them." No Court has ever stated any "numerous and obvious reasons," for there have been none. The propriety of a waiver is abundantly shown elsewhere in this point.

In the case of Ins. Co. *vs.* Smith, 41 S. W., 680, there was no *discussion* of the question of waiver.

The Warner case, 100 Michigan, 157, was not a case construing the New York statute in question, but another statute in the State of New York relating to Assessment Companies. The policy provided that notice should be sent that the premium was payable and that any other notice was expressly waived. It further provides that in the event of the holder not receiving a notice he should pay an amount equal to the last premium paid.

The statute requires that each notice shall truly state *the cause and purpose of the assessment.* The Court held that these statutory provisions could not be waived by the parties and that the statute contemplates that through the notice the policyholder should be advised *of the cause and purpose of the assessment.* The statute could not be voided by a condition annexed to the policy, but in case no notice was given the insured should forward to the association an amount equal to the previous assessment, spoken of in the statute as "the scope," but this statute is entirely different from the one at bar.

The following cases are cited to show the great variety of instances in which the doctrine of waiver is applied in both State and Federal Courts, all bearing directly upon the present case.

Wright vs. United States (1883), 108 U. S., 281.

Section 3264 of the Revised Statutes provides for a survey of the distillery by the collector, and a written report thereof in triplicate, "of which one copy shall be delivered to the distiller, one copy shall be retained by the collector, and one copy shall be transmitted to the commissioner of internal revenue, and the survey shall take effect upon the delivery of such copy to the distiller."

Said the Court (WAITE, C. J.): In holding that the distillers had waived notice by endorsing on the report

of the survey and signing "We hereby accept the within survey and consider the same as binding upon us on and after this date," with date attached, "the Court below decided that this endorsement was in law a waiver of a delivery of a copy of the report to the distillers, and that the tax was consequently collectible. To this we agree. The language of the act is that 'the survey shall take effect upon the delivery of said copy to the distiller.' This is equivalent to saying that the survey shall be binding on the distiller when the copy is delivered to him. When, therefore, the distiller, in this case, accepted the survey and stipulated that it was binding on him, he, in effect, said that he would consider the survey as having effect without the formal delivery of a copy. *This he might do.*"

In Shutte vs. Thompson (1872), 15 Wall., 151, this Court held that:

Although the formalities prescribed by the thirtieth section of the Act of Congress of September 2d, 1879, authorizing the taking of depositions *de bene esse* in certain cases and stating the circumstances under which and the words in which they may be taken, must be strictly observed (the act itself being in derogation of the common law), yet a party may waive any provisions intended for his benefit. Said the Court: "A party may waive any provision, *either of a contract or of a statute intended for his benefit.*"

In Ins. Co. vs. Norton (1877), 96 U. S., at page 240, this Court says:

"*A party always has the option to waive a condition or stipulation made in his own favor.*" Rule applied in holding that an insurance company had, by accepting premiums after they fell due, waived its right to insist upon a forfeiture for non-payment of premiums which were tendered when insured was *in extremis*.

In Henderson's Distilled Spirits (1871) 14 Wall., 44, Mr. Justice Clifford said: "Being a seizure on land, the claimant is entitled to a trial by jury, but he appeared and the parties entered into a stipulation waiving a jury and submitted the case to the Court upon an agreed statement of facts *as they had a right to do, even before any legislative provision was enacted for waiving a jury by a written stipulation.*"

This Court in the following cases has held that statutory and constitutional privileges may be waived by the persons for whose benefit such provisions are enacted:

Beers *v.* Arkansas, 20 Howard, 529.
(Constitutional privilege of State not to be sued by individual may be waived.)

Bomberger *v.* Terry, 103 U. S., 40.

Rogers *v.* U. S., 141 U. S., 554.
(Jury may be waived.)

Kaukauna Water Co. *v.* Green Bay, etc., 142 U. S., 280.
(Statutory right to compensation for land taken by eminent domain may be waived.)

Sanger *v.* Nightingale, 122 U. S., 183.

Allen *v.* Smith, 129 U. S., 465.
(Statute of limitations may be waived.)

Ins. Co. *v.* Morse, 20 Wall., 451.
(Right of removal to Federal Court may be waived.)

Wight *v.* Davidson, 181 U. S., 377.
(Constitutional right of protection against unjust taxation may be waived.)

Howard *v.* Stilwell, 139 U. S., 199.
(Right to object to interrogatories may be waived.)

See also

Reynolds *v.* Douglass, 12 Pet., 505.
(Guarantor waives notice by acknowledging debt.)

Murphy *v.* Sewing Machine Co., 112 U S., 692.
(Surety may waive right to notice.)

In Tasker *vs.* The Kenton Ins. Co., 58 N H, 469 (1878).

The policy contained following clause:

> **"It is furthermore hereby expressly provided and mutually agreed that no suit or action against the company for the recovery of any claim by virtue of this policy, shall be sustainable in any Court of law or chancery unless such suit or action shall be commenced within twelve months next after the loss shall occur.**
>
> **The action was not commenced within the twelve months succeeding the loss. The clause, said the Court, "is in form and effect a condition precedent and unless it is complied with, there can be no recovery at common law. It is said that the action may be maintained under the provisions of Gen. St. C., 157, S S., 6, 7. * * * But the parties to the policy did not intend that the statute should govern or control it, as they have expressly agreed that the clause in the policy shall be operative, any statute of limitation to the contrary notwithstanding. *Statutes that are made for the benefit of particular persons may be waived by them.* Sections 6 and 7 were evidently enacted for the benefit of those insured, but the plaintiff has waived their benefits in terms as absolute as language can express."**

In Ellis *vs.* Mass. L. Ins. Co. 113 Calif., 612, a life policy provided that no claim should exist under it unless notice and proof of death were given within two years from death of insured. A statute fixed a shorter period, namely, ninety days within which such notice should be given. In holding that the policy provision was a waiver of the statutory benefit, the Court said:

> **"This requirement in reference to the time of notice and proof of death is imperative and binding upon the insured and his beneficiaries But this is a provision incorporated in the law for the benefit of the insurer. A provision in a law or in a contract intended for the benefit of a party may be waived by the party to be benefited thereby."**

In the case of Eimerman *v.* Nathan, 116 Wisc., 124 (1902), the Court, in holding that a landlord had *waived* the giving of the *statutory notice*, required of a tenant upon vacating premises held from year to year, uses the following language: "In speaking of notice to terminate such tenancy, a standard text writer says that such notice, like almost every other species of notice required by law for the preservation of a right, or the exaction of a duty, may be waived. * * * It may be waived by either party before it is due, or after failure to give notice, by acting in conformity to the wishes of the

other party, in amicably terminating the tenancy precisely as though notice had been given. It may also be substantially waived by acting upon a defective notice. And there may be waiver of notice by the party giving it, when he subsequently acts toward the other party precisely as though no such notice had been given.' Wade, Notice (2d Edition), § 641. Upon the facts stated, the Trial Court was justified in finding that the plaintiff *waived* the giving of *written notice as required by the statute*, and accepted a surrender of the premises from the defendant on April 30, 1899."

In the matter of N. Y., L. & W. Ry. Co., 98 N. Y., 447, in holding that a contract appointing a commissioner to determine the value of property appropriated by the company, and regulating the proceedings, was binding upon the party, said EARL, J., of the New York Court of Appeals :

> " Parties by their stipulations may in many ways make the law for any legal proceedings to which they are parties, which not only binds them, but which the Courts are bound to enforce. They may stipulate away statutory and even constitutional rights. They may stipulate for shorter limitations of time for bringing actions for the breach of contracts than are prescribed by the statutes, such limitations being frequently found in insurance policies. They may stipulate that the decision of the Court shall be final, and thus waive the right to appeal ; and all such stipulations not unreasonable, not against good morals, or sound public policy, have been and will be enforced ; and generally, all stipulations made by parties for the government of their conduct or the control of their rights in the trial of a cause, or the conduct of a litigation, are enforced by the Courts."

In the case before us there was an express waiver of the rights to this notice. The object of the act, therefore, was for the benefit of the assured; and there is no statute of New York or Washington which prevents him from entering into a contract that he dispenses with that notice. He has done so in this case by accepting the policy containing that provision.

As heretofore stated, it is contended by defendant in error that the statute of New York, above quoted, applies to and governs this policy by reason of the express agreement of the parties to that effect.

This contention of defendant in error furnishes additional ground, as shown fully above in Point II, for holding that the position taken herein as to the waiver of the provisions of this paragraph, is correct. If this contract is governed by the statute of New York, because the parties have stipulated that it shall be so governed, and by the same contract the parties have limited the application of said statute, and have agreed that no statutory notice shall be necessary, then, surely, if effect is given to their contract for the purpose of subjecting this policy to the control of the New York statute at all, effect must also be given to this waiver.

No one paid on behalf of the children.

In this Hill case this Court has said:

> "Here, as in the last two cases, is disclosed a distinct agreement upon the part of the insured and the Company to waive and abandon the policy and all rights and obligations on the part of the parties thereto.
>
> But it is said that the insured was not the beneficiary; his wife, and in case of her death, their children, being named as such, and that it was not in his power by non-payment or waiver or abandonment, to relinquish or cancel her or their rights in the policy. It is doubtless an interesting question how far the action of the insured can affect or bind the beneficiaries in a life insurance policy. If the answer in this case contained simply the allegation in respect to the insured's agreement with the company, we should be compelled to enter into an examination of that question; but it is alleged not only that the insured and the company

agreed to abandon the contract, but also that the beneficiary, his wife, and the plaintiffs, their children, "failed, neglected and refused" to pay the premium. So we have a case in which not only did the insured and the company abandon the contract, but also the beneficiaries neglected and refused to do that which was essential to keep the policy in life. The allegation in the answer does not disclose a mere omission, for it is 'neglected and refused,' and, of course, there can be no refusal unless with knowledge of the opportunity or duty. A party cannot be said to refuse to do a thing of which he knows nothing. Refusal implies demand, knowledge or notice. The case, therefore, is one in which beneficiaries refused to continue the policy, while the insured and the company abandoned it."

This holding was upon demurrer. We are now confronted by the actual facts. This question as to the children contains upon examination nothing whatever to support their claims. Above we have shown fully how the failure of Hill to pay concluded the children. No one else having come forward in their behalf. In this subdivision we treat of the omission of the children themselves to pay.

This Court says that the allegation of the Hill answer does not disclose a mere omission. This Court does not, however, go so far as to say that the mere omission is not sufficient to terminate.

We think it is, however clear that so far as the children are concerned their omission is sufficient. It is to be observed that premiums became due in 1887, in 1888, 1889 and 1890, and during all these years the only beneficiaries in this policy omitted to keep it alive. They had a guardian and his omission are theirs. His knowledge and their knowledge are immaterial, under the Vose, Klein, Knickerbocker, Miles and Schneider cases above. Their ignorance might be material if any

statutory notice had to be sent to them. As it was, proof of their ignorance of the existence of the policy was wholly immaterial. Their ignorance does not excuse payment. The premium notice law of New York does not require any notice whatever to be sent to the beneficiaries. They cannot, therefore, complain in this Court that the statutory notice was not sent them. The Company was under no duty or obligation to send them notice. The Company could not undoubtedly refuse to accept a premium from them, but it was not obliged to demand it from them or notify them either under the statute or under the contract. If they desire to keep the policy alive themselves they must come forward or someone must come forward in their behalf and pay the premium, and the only obligation the Company is under in regard to them is doubtless an obligation not to refuse the premiums in case they tender them. So far as they are concerned, therefore, the omission to tender these premiums was effective to lapse the contract entirely irrespective of any question of statutory notice.

This Court says: "There can be no refusal without knowledge of the opportunity or duty. A party cannot be said to refuse to do a thing of which he knows nothing. Refusal implies demand, knowledge of notice."

The pleadings fully justified the Supreme Court of the United States in their views, but the Supreme Court of the United States did not limit the termination of the contract to such "refusal." They said such refusal was sufficient. They did not say that nothing else would be sufficient.

We have shown above that the application was signed by Hill. It is also to be specially noted that it was signed as follows:

"Signature of the person to whom the insurance is payable, Ellen Kellogg Hill, by G. D. Hill." The application also contains the following:

3. A. Name of person to whom insurance is payable at death?	A. Ellen Kellogg Hill.
B. Residence? C. Relationship?	B. Seattle, W. T.; C. Wife.
4. C. If a life policy for the benefit of the wife, shall it be paid to her children, to your children, or to the children of the two, if she be not living at the maturity?	A. To the children of two.

The policy itself states it was payable,

"Unto Ellen Kellogg Hill, wife of George Dana Hill, of Seattle, in the County of King, Washington Territory, for her sole use, if living, in conformity with the statute; and if not living, to such of the children of their bodies as shall be living at the death of the said wife, or to their guardian for their use?

All that has been said above in regard to the presumption of knowledge of the due date of the premium by Hill and of his being bound by the contents of the application and the policy and the waiver therein applied equally to Ellen Kellogg Hill, the wife, who was a direct party through her husband to the application. She was a primary beneficiary. The children were the secondary beneficiaries. The children were not even third parties, so to speak. If the mother was not living the policy was payable "to such of the children of their bodies as shall be living." The children took through their parents, the ex-

press parties to the contract, and as such children. Certainly whatever bound the father and the mother must equally bind the children. They could not have the benefit as minors without bearing the burden as minors. They have no interest whatever in this contract except such as they derive through the application of the father and the mother.

Mr. Warburton's argument upon this point we think unsound. He alludes to the case of the Washington Life *vs.* Haney, 10 Kansas, p. 403, in support of his proposition. In that case the question was, "Can "declaration of a party whose life is insured for the "benefit of another, made long after the application "and the contract, be received in evidence against the "assured to impeach the truthfulness of the applica- "tion?" There is no question in this case of impeaching the truthfulness of the application. The sole question in this case relates to the effect of sending no notice if the statute applies. The Haney case has no application.

The case of the Granger's Life *vs.* Brown, 57 Miss. Reports, 308, also cited by Mr. Warburton, relates also to declarations contradicting the written statements in the application. The Court in the Brown case is concerned only with the application, but in the question before us the insured has certain statutory relations in connection with the payment of premiums if the statute applies.

The case of Pingrey *vs.* National Life, 144 Mass., 381, instead of being in Mr. Warburton's favor is against his views. In the Hill case Hill entered into no obligation to continue to pay the premiums.

The Pingrey case held the insured could not surrender the policy. In the Pingrey case when Pingrey surrendered the policy which was in favor of his mother he received in place thereof a policy payable in favor of

this wife. The legality of selling another person's property and receiving the proceeds himself is one thing, the effect of the mere non-payment of the premiums is entirely different.

In Garner *vs.* Germania Life, 110 N. Y., 267, cited by Mr. Warburton, no question arose such as stated by Mr. Warburton. The question in the Garner case is thus stated by the Court, "what he, that is the insured, undertook to do was to destroy the trust *by substituting a new and different beneficiary.* There is no question of that kind here. In the Garner case the Court said, "he, that is, the insured, might omit or refuse to pay a maturing premium, and so suffer the policy to lapse, but the children were at liberty to pay it, though he should refuse, and if they did the contract would remain valid as at first, and suffer no injury or destruction from his refusal to pay. or to further act as his children's trustee." The Hill children were at liberty to pay, but if they did not they would necessarily suffer injury or destruction from the refusal to pay.

Stokes *vs.* Amerman, 121 New York, 337, quoted by Mr. Warburton, was entirely a New York case. It relates to a policy on the life of a resident of New York whose post office address was in New York, and who was insured in the Equitable Life. It refers to right to paid-up policy after three annual premiums had been paid. Only one premium had been paid in the Hill case, and there was no question of a paid-up policy in the case.

The argument in this point can be summed up as follows:

The contract of insurance in this case being a conditional one, the obligation to pay upon the death of Hill depended upon the performance of the conditions of the contract during his lifetime. These conditions con-

fessedly were not performed, and, therefore, the children of Hill cannot successfully maintain this action, unless their right is saved by the premium notice law of the State of New York if applicable. If, therefore, it be assumed that this law controls the contract of the parties, nevertheless, the beneficiaries are bound by the statutory agent Hill's acts, whatever the scope of his authority as between them, for their rights depend solely upon thestatute. They cannot be broadened by inference or intendment. The statute provided for notice to the insured and to him alone, there being no assignee; whatever is sufficient, therefore, to meet the requirements of the statute is sufficient to conclude the rights of the beneficiaries.

The question is not necessarily one of contractual authority between Hill and his children. They are seeking to recover in this action upon a contract, otherwise void on the sole ground that the insurance company has not complied with the requirements of the statute. The object of this law is aptly expressed in the following language of the Supreme Court of Washington in the case of Lone *vs.* Mutual Insurance Company, *supra:*

"And the Legislature taking into consideration the in firmities of memory, enacted this statute for the purpose of preventing insurance companies from taking what in homely phrase is termed 'snap judgment' on its patrons, thereby depriving them of the benefits of contracts by reason of slight negligence on their part, and when there was no real intention to rescind—a beneficent and just law if enforced in the spirit of its enactment, but oppressive and unjust if construed with narrow and literal exactness."

To claim that the Company took a "snap judgment' upon Hill's children would be absurd.

POINT IV.

It was not the intention of the New York Legislature by the premium notice statute to keep a policy alive, and its provisions unimpaired, notwithstanding successive defaults to pay the premium and the abandonment of the contract.

This would be an inequitable construction of the statute and yet this is the practical effort of the plaintiff's contention.

No Court has ever held contrary to the above and the Supreme Court of Washington in the case of Lone *vs.* The Mutual Life (opinion annexed hereto), has just adopted this view referring in its opinion to the Phinney case, 178 U. S., 327.

The literal construction of this statute as claimed by the plaintiff would produce results too oppressive and unjust to have been contemplated. Such a construction would confiscate the property of the other policyholders. The meaning of the statute is to be ascertained by the co relation of the laws relating to the subject-matter, and by the evident intent of the law-maker It is to be enforced only to that extent. In the State of New York this statute has been substantially construed as above claimed.

In the first case, Carter *vs.* The Brooklyn Life Ins. Co., 110 N. Y., 15, the facts were that the policy in question was subject to an annual payment of $82.80, to be paid on the 25th of October in each year, and it contained the usual clause of forfeiture. The annual premiums were regularly paid from 1870 to 1883; and it will thus appear that there were thirteen years' premiums received by the company, of which,

in accordance with the lucid opinion of this Court in the case of the New York Life Insurance Company *vs.* Statham, quoted by this Court in the Cohen opinion, there was a large accretion of these premiums over and above the amount necessary to carry the risk lying in the hands of the company unabsorbed by the cost of carrying the life for that length of time, and which in ordinary insurance parlance is called the "reserve." The notice was not given, but before the next installment of premium became due a tender of the amount was made and a reinstatement of the policy demanded. Upon the refusal of the company to reinstate the policy an action in equity was brought to compel them to do so; and the Court held that they were compelled to do so, and the Court held rightly under this statute. In this case the premiums were compelled to be paid in New York. The collection of the premiums yearly was being had in the state of New York. But that is the extent to which the statute goes. Before another installment becomes due, the unpaid premium should be tendered as well as the coming due premium, at least, upon the date when the latter was due. A reinstatement of the policy after these tenders does not shock the moral sense, or violate our notions of justice or equity. Before the next premium becomes due restitution may be sought to be made, and an application to the equitable powers of the Court to restore the policy may be made.

In the second case, Phelan *vs.* Northwestern Mutual Life Ins. Co., 113 N. Y., 147, the Court decided that the statute operated upon foreign companies doing business in New York, and which issued the policies in that state, delivered them there and received payment for them there. It appears from the record that Phelan resided in New York *and the premiums were collectible there.* In that case the premium was due on December

30, 1892, and it was not paid; but it was tendered to the company about 2 o'clock on January 15, 1893, just fifteen days after it became due, but was refused. The assured died on the night of that day. It was held that the policy was in force.

It is well to bear in mind here the familiar doctrine that "the opinion of the Court must always be read in connection with the facts upon which it is based."

Doyle vs. *Continental Ins. Co.*, 94 U. S., 538.

Applying this familiar principle to the Phelan case, the decision of the court illustrates the true function of the statute. Here was a case where there was a large accretion of premiums in the hands of the insurance company; here was a default in the payment of the premium, and within a very reasonable time a discovery of the default, and an attempt to place the policy-holder right again with the company, and a tender of the premium with that end in view. Here was an attempt to rectify a mistake which had been made, and it was done within a reasonable time, and payment of the premium due was tendered so as to lay the foundation for the continuation of the contract.

In the third case, Baxter *vs.* The Brooklyn Life Insurance Co., 119 N. Y., 450, the action was brought by an assignee of the policy, who resided in New York and whose premiums were collectible there. The insured died on the 7th of September, 1884, and the premium was due and unpaid on the 24th of August, 1884, a few weeks only. It was held here that the plaintiff could recover, in consequence of the failure to give the notice required by the statute; but the Court was divided upon several questions involved. The Court, however, declared by the Judge writing the majority opinion that

the purpose of the statute was to establish a rule which would preserve to the assured the benefits of the premiums paid, and gave him an opportunity to save them from forfeiture by payment within the specified time. It was held there that it was not necessary to tender the amount of the premium due before the action was brought. The Court consisted of seven Judges, and the decision was by a bare majority, three Judges dissenting—Chief Judge Andrews and Judges Earl and Gray.

Says Judge ANDREWS: "The construction placed on the statute in the prevailing opinion that by its operation the premium does not become due until after notice and the expiration of thirty days, and that meantime an action may be brought and a recovery had on the policy, although the premium has not been tendered, is, I think, untenable. * * * It is a condition precedent to the maintenance of such an action that the plaintiff must before suit brought have paid or tendered the premium unpaid. * * * He is not required to show that it was paid or tendered on the day fixed in the policy, because the statute relieves him from that, but he must aver and prove that the payment was made at some time before the action was commenced, or else no right of action has accrued. This construction fully accomplishes the purpose of the statute, while it relieves it of the anomaly that a contract to pay an insurance on condition of the payment of the premiums may be enforced, although the condition has never been performed."

There is another case. De Freece *vs.* National Life Ins. Co., 136 N. Y. 150, but there is nothing in that case which varies from the general view of the statute taken by the Court on this point in the cases above cited.

It thus appears that there is a settled construction as to the right to be relieved from a forfeiture by the Courts of the State of New York under this statute, provided that prompt and immediate relief is sought. It is not

determined how long a time one may with safety rest after the default is continued before some step should be taken to rehabilitate himself by the policy-holder. It will be seen that a powerful minority of the Court objects to the maintenance of an action where the premium has not been paid or tendered before action brought; and there can, therefore, be said to be no settled rule of construction in New York upon this clause of the policy. In such a case it is manifest that the Courts of the United States, before whom the policy may be brought are themselves to construe the policy in accordance with the principles of law applicable to such construction.

The forfeiture is forbidden by the statute for the non-payment of any premium, unless notice is given in such cases. It does not extend its prohibition beyond the singular number, and the non-payment of a second premium unpaid a year after the first, is not touched upon by the statute. Unless the Court can say from this statute, taken in connection with all the laws relating to life insurance, that it was the intention of the legislature to keep the policy alive and its provisions unimpaired even after successive defaults to pay the premium, the plaintiff cannot recover. Will the law bear this construction? Can the judicial mind contemplate such a violent interference with personal rights as being within the contract, unless it is plainly so expressed in the statute?

(A.)

The intention to preserve the contracts only for a year, is clearly shown by the Amendment of 1897.

The Hill policy was issued in 1886 and the first default was in 1887. Hill died in 1890 and the suit was begun

in 1895, so that no question arises in the Hill case directly as to the operation of the Act of 1897.

The defendant in this case has always claimed that the Act of 1897 applies to all defaults after the passage of that act, but the Hathaway case in which this point is raised in the Circuit Court of Appeals was finally disposed of by that Court in accordance with the decisions of this Court, on the ground that the New York statute was not applicable, so that no decision was made in regard to the Act of 1897. The Act of 1897 is here alluded to, not because it has a direct effect upon the Hill contract, but because it is believed that the Act of 1897 in part expresses the true principles which must govern the construction of the previous Act of 1877.

The Laws of 1897, Chapter 218, which took effect April 8th, 1897, amended the laws of 1892, Chapter 590, Section 92.

The claim which we make under this point is that this Act of 1897 is declaratory of the principle stated in "A" above, and also declaratory of the general doctrine that the statute has no extra-territorial operation, for the statute of 1897 says: "postoffice address in this State," that is, New York, and the previous premium notice statute of 1877 must be read in the light of the Act of 1898.

The last sentence of the act of 1897 must be read in connection with the first part of the act.

The main *reason* for the passage of the act was this:

Under the acts of 1876, 1877 and 1892 insurance companies frequently sent notices irrespective of the question whether they were legally obliged to do so or not, but sometimes they happen to be too informal, or were not sent in time. So that not only were there occasionally *bona fide* cases where New York policy-holders, at least, should have recognition, but there was a class of

cases of where policy-holders had clearly abandoned their contracts, yet after death parties had attempted to get insurance for nothing by rai-ing some technical question as to notice, though years had elapsed without the payment of premiums.

The nature of the insurance contract requires *annual* payments (or semi or quarter-annual for convenience merely), and the Act of 1897 was passed in recognition of this principle, and of the principle stated in "A" above. The Statute of 1897 did away with these attempts to get insurance for nothing, and declared that if the policy-holder had the thirty days' previous notice in which to prepare for the payment and pay, the loss was his at the end of that time.

But suppose the company *did not send the notice* in cases where it was obliged to, or sent an informal notice, or one not in time, the policy-holder in New York was not to keep on for years, perhaps, refusing or neglecting to pay premiums and yet the policy be kept alive, but he must *before* the next premium becomes due pay up, or litigate the question as to whether there had been a forfeiture or not.

If the second premium day came and the first premium was not paid, where *there had been no legal notice* in that State, then the policy would be forfeited.

The bar to suit is in the last sentence and carries out the early part of the statute. The language is:

> "within one year from the day upon which default was made in paying the premium * * * *for which it is claimed that forfeiture ensued.*"

Not that a suit can be brought within one year after a *forfeiture*, for there is no claim.

But the words "forfeited policy" means policy claimed to be forfeited by the company. The policy-

holder has a *year* to demonstrate that no *legal* notice was sent, if the company claims it was.

The claim made here has been already sustained in the Oregon State Court in the case of Hathaway vs. *New York Life (unreported.) In that case only one premium was paid and the last default was in 1892. The suit was begun April 8, 1899, more than one year after the last default. The Court found as a conclusion of law as follows: "That this action was not brought within one year from the date upon which default was made in paying the premium due upon said policy, for the non-payment of which it is claimed that said forfeiture ensued, and is barred for that reason.*

B.

The notice in Statute of 1877 referred to forfeiture of premiums already paid on policies or the reserve thereon and to nothing else.

This is one of these cases where the true construction of a statute does not appear upon the surface. But little idea of the scope or effect of this statute can be obtained from a mere *cursory perusal* thereof. In order to reach its real meaning one has to be familiar with all the other statutes upon the same subject, in force at or pre-existing the time of the passage of the statute in question. To construe a statute properly there should be an appreciation of the exact quality of the evil against which the statute was aimed, its extent and its mischief. If the statute is a penal one, that is, if it forbids the doing of some act which otherwise it would be lawful to do, then it has to be strictly construed. If it is a remedial statute, then it is to be construed so as to bring about the remedy which the statute was intended to procure. But, above all

things, the statute must be construed with just ends in view. It must not be extended beyond the remedy which is intended, and particularly it is not to be extended so as to do an injustice, inconvenience, or absurdity. We are not to suppose that the Legislature, in attempting to remedy a wrong, itself created a greater wrong.

Now, let us look at this statute in the light of this familiar bearing. Contracts of insurance such as the Hill are made for the purpose of securing a principal sum to be paid on the death of the life insured, and, in order to secure this principal sum to be so paid, premiums are paid to the company on fixed days. It is absolutely necessary, in order to conduct the business successfully, that such premiums should be so paid because life insurance takes into account not only the average of human life, but compound interest upon the premiums. The payment of the premiums due is therefore essential to the fulfillment of the contract by the company. The contract is not for a fraction of a year or from one installment period to another; although there is that sort of insurance called "term insurance," which is expressly excluded from its provisions. The contract is in two parts. One is a proposition in writing signed by Hill and his wife and addressed to The Mutual Life Insurance Company of New York. The statements made in that application are offered as an inducement to the company to grant the application for insurance; and the policy, when issued, recites that this application is the consideration for granting the policy. The policy provided that the premiums would be accepted when paid in exchange for the company's receipts; and then the following provision was in the policy: "Notice that each and every payment is due at the date named in the policy, is given and accepted by the delivery and acceptance of this policy, and any further notice re-

quired by any statute is hereby expressly waived." *It has a still further provision that "if this policy shall become void for non-payment of premium all payments previously made shall be forfeited to the company, except as hereinafter provided"* (Rec., p. 78).

Now, here is the forfeiture which the statute refers to. This is the forfeiture which is aimed against, and this is the forfeiture which the statute forbids the companies to enforce. What is it? It is not the right to make a contract with the company, or to contine a contract already in existence. The statute prevents the forfeiture. Of what? Why, of the premiums which have heretofore been paid on the policy, and of nothing more. There is nothing more to forfeit. To give such a construction to this statute, that not only is the forfeiture waived, which in this case amounted to one year's premium, but that an effect shall be given to the policy the same as if the premiums were regularly paid on each succeeding installment day provided in the policy, would be to give it a construction contrary to reason and contrary to justice. It would be a violation of the rights of the insurance company, that is, of the persistent premium-paying members, which is unnecessary in order to accomplish the non-forfeiture of the premiums. The statute was intended to provide that notice should be give of the recurrence of the payments, so that the policy-holder should not by forgetfulness, not pay his premium when due. It cannot be construed to mean that the policy-holder was forever discharged from his obligation to pay the premium because of accidental or other failure to send notice. Whether insured had actual notice or not, there is something to forfeit. There is an accretion in the hands of the company of the surplus paid each year the policy has been in force, which is forfeited unless the premium is paid. *It is to prevent that forfeiture that the statute*

was passed, and in this case one year's premium has been paid. To do equity between the parties, you would have to deduct from that one year's premium the cost of carrying the insurance for one year as if it were a term policy, and then the amount of surplus which remains in the hands of the company, and which by the contract it has power to forfeit but for the statute, would be the amount of the proper recovery in this case if the statute applied, but of course it does not.

This is rendered clear by the decision of this Court in the case of the New York Life Insurance Company *vs.* Statham, 93 U. S., 24. The policy in that case had become by its terms void, and the reserve, or surplus, in the hands of the company had been forfeited to the company in consequence of the war with the Southern States. The Court said it was not proper that the policy should be revived, so that upon the policy-holder's offering the amount of the accrued premiums which had been withheld, together with interest thereon, the policy should be reinstated. Mr. Justice Bradley, on behalf of the Court, exhibits not only his clear knowledge of equitable principles and their application to the ordinary affairs of life, but also his accurate knowledge of life insurance. He says: "But whilst this is true, it must be conceded that promptness of payment is essential in the business of life insurance. All the calculations of the insurance company are based on the hypothesis of prompt payments. They not only calculate on the receipt of the premiums when due, but on compounding interest upon them. It is on this basis that they are enabled to offer assurance at the favorable rates they do. Forfeiture for non-payment is a necessary means of protecting themselves from embarrassment. Unless it were enforceable, the business would be thrown into utter con-

fusion. It is like the forfeiture of shares in mining enterprises, and all other hazardous undertakings. There must be power to cut off unprofitable members, or the success of the whole scheme is endangered. The insured parties are associates in a great scheme. This associated relation exists whether the company be a mutual one or not. Each is interested in the engagements of all, for out of the co-existence of many risks arises the law of average, which underlies the whole business. An essential feature of this scheme is the mathematical calculations referred to, on which the premiums and amounts assured are based. And these calculations, again, are based on the assumption of average mortality and of prompt payments and compound interest thereon. Delinquency cannot be tolerated nor redeemed, except at the option of the company. This has always been the understanding and the practice in this department of business. Some companies, it is true, accord a grace of thirty days, or other fixed period, within which the premium in arrear may be paid, on certain conditions of continued good health, &c. But this is a matter of stipulation, or of discretion, on the part of the particular company. When no stipulation exists, it is the general understanding that time is material, and that the forfeiture is absolute if the premium be not paid. The extraordinary and even desperate efforts sometimes made, when an insured person is *in extremis*, to meet a premium coming due, demonstrates the common view of this matter." The Court in that case: "Non-payment at the day involves forfeiture, if such be the terms of the contract." Then the Court goes on to show what there is in the hands of the company to be forfeited, surplus premiums over the amount which was necessary to carry the expired risks, and which is called in insurance circles the "reserve."

That is all that could have been forfeited under any circumstances by the contract. Now, the statute comes in and says that the company shall not forfeit that unless it gives notice. This is a very different thing from saying that unless it gives notice the contract shall be continued to the end of the life of the party insured, and if at any time hereafter he shall die, the whole amount of the insurance shall be paid over after deducting the back premiums If he lived long enough to make those premiums equal to the amount of the principal sum, the company would never hear of him. If he died within a few years, as Hill died in this case, then the company would hear of him as it has heard in this case, with a claim for the amount insured, without any attempt whatever to pay the premiums, which are confessedly unpaid and in arrears. No legislature could ever have meant such injustice. There must be some limit to the time of rehabilitation. To prevent a forfeiture is not to decree a continuance of the contract all on one side, with no payments on the other. There is no language in the statute which will bear the construction that it was intended to apply to more than one failure to pay premium or to preserve to the policy holder more than his reserve.

This statute is as we have shown elsewhere, highly penal as regards the company. The penalty cannot be exacted more than once while the first overdue premium remains unpaid. The statute, if applicable, was exhausted upon the failure to give the notice in April, 1887, and until the assured paid that premium he could not claim the benefit of the statute for the failure to give notice of the payment due a year after in 1888. This would be construing the statute as if it contained the language "that the company is forbidden to forfeit for each and every premium unpaid for which proper notice had not been given.'

The penalty is inflicted upon the company solely to prevent the forfeiture by inadvertence, mistake or forgetfulness. It was not intended to release the insured from all future liability. There can be no continuous credit given for the premiums on the ground of a continuous failure to give notice.

Fisher vs. N. Y. C. & H. R. R. Co., 46 N. Y., 644.

In this case the Legislature had forbidden railroad companies to charge more than two cents a mile for passengers, and inflicted a penalty of fifty dollars for disobeying the law. A passenger rode again and again upon the railroad and then sued for the accumulation of penalties, but the Court of Appeals held that only one penalty could be recovered, for in the quaint language of Judge Grover, who wrote the opinion, people should not be permitted to keep a "book account" of penalties.

SUMMARY UPON THE LAW AND FACTS OF THE CASE.

1. By payment of premium, and delivery of policy, the contract actually came into being in Washington and under the Cohen case became a Washington contract.

2. The insured, from the date of the application to his death, was a resident of Washington, and had no postoffice address in the State of New York. Therefore, the law of New York is inapplicable to this case, because it relates only to instances where the insured or his assignee has a residence postoffice address within that state and the collection of premiums there.

3. The contract was actually entered into in the State of Washington, and can only be deemed made in New York by the convention of the parties; the fact is that so far as the *application* is concerned, the parties have made that portion of the contract subject to the laws of the State of New York; and it is equally certain that so far as the after-matter of notice of the due date of premiums, they have made their express stipulation of waiver, and thereby eliminated the statute of New York.

4. The contract was admittedly made in the State of Washington. Its enforcement is sought in the courts of the United States. It is not contended that there is anything in the contract which is in the slightest degree prohibited by, or repugnant to, the common law or the statutes of Washington or of the United States. We have shown that being made outside the State, the New York statute did not, *ex proprio vigore*, affect to any extent whatever the rights and liabilities of the parties. Both the insurer and the insured were therefore perfectly free to contract together as they saw fit. They could make the requirements of this statute a part of their contract, or they could leave them out, or they could embody part of the law and omit the residue. The business rested with them alone; it was a matter of no concern whatever to any other person or body politic.

There can be no question that the parties might have agreed that the notice law of New York should be deemed a part of the policy, but otherwise the terms and conditions of the policy should be governed and construed by the laws of Washington, in which case the notice would have been necessary. Nor can there be any question that they might have agreed that the policy should be governed and controlled by all of the laws of the State of New York with the exception

of the notice law, in which case the sending of the notice would have been unnecessary. In either case the contract would have been binding on the parties, it would have measured their respective rights and liabilities, and the plain duty of the courts would have been to enforce it as it was written.

They did agree to leave out the premium notice law.

5. The insured was an experienced business man. Personal demand was a number of times made upon him for the premium of 1887, and proper receipt tendered. He declined in each instance to make payment, and sufferred the renewal receipt to be returned to the home office, and never again offered payment or asked a renewal of his policy. No one offered to pay on behalf of the children. Upon the faith of the failure to pay the policy was entered upon the books of the company as lapsed and terminated, and the contract abandoned. The Supreme Court has ruled the New York Statute imposed no restraint whatever upon the insured, and left the parties in their mutual relations as free as if it had not been enacted. In any other contract, a failure for four successive years to make annual payments upon a contract as a condition of its continuance, would defeat the defaulting party in an action in the nature of specific performance. Under the decision referred to it must therefore defeat this action.

6. The insurance company does not rely upon the statute of New York and a forfeiture under it, but it does rely upon the defense of the insured being the statutory agent to receive the notice, his actual notice, and the failure of anyone to pay. Hill deliberately chose to decline and refuse to pay the premium, and to persist in this course for four years, until his death, and no one else stepped forward. The Supreme Court

has held the New York statute in no manner touched or restrained him.

7. The insurance company is a mutual association. Its members are its premium paying policy-holders. The funds from which their insurance is paid is supplied by the aggregate of promptly paid premiums, and the income therefrom. Existing members remain, and new members join the association, on the faith of this fund belonging, proportionately, to the contract-performing members in payment of original insurance, increase of policy or reduction of premiums. One premium only having been paid on this policy, no claim upon the fund exists in favor of Hill or of anyone claiming under him.

8. The insured Hill was the only person under the New York Statute—if it applies—with whom the insurance company had anything to do. He was the Statutory agent. That statute provides for notice upon the insured and his assignee only. It contemplates no notice to the beneficiaries, either primary or secondary.

Hill waived statutory notice.

9. If Mrs. Hill, instead of plaintiffs below, were claiming this insurance, she would be estopped, because having signed the application of insurance, she brought herself within the contract, so as to know or be bound to know, its terms. If Hill, as we contend, was the principal in the contract—she receiving the gratuity of his bounty, did so, upon the terms in which he made the contract, and with knowledge that his refusal or conduct could terminate this contract as any other he might enter into unless someone else stepped forward for her. That he was at liberty to pay or decline to pay premiums, or to continue or end paying on the contract. If she was the principal Hill was her statutory agent,

and she was bound by her agent's act, and could not claim the benefit of the policy without ratifying and assuming whatever he may have done or declined to do in the way of keeping the policy alive.

10. The plaintiffs below were not parties in any manner to the application for the policy of insurance. They never could come under its benefits except subsequent to its execution and delivery, and until their mother's death, so that they claim under their mother, and whatever would bind her equally binds them.

11. In any event they are the beneficiaries of a gift or gratuity, and can only accept such gift or benefit upon the terms and conditions upon which it was given, and by the act of acceptance must adopt and ratify the contract, just as it was made with the insured. This conclusion makes them bound by the failure to perform the contract by paying the premiums and the abandoning of the contract by everyone on their behalf.

12. It was not intended by the Legislature of New York to keep policies alive after successive defaults in the payment of annual premiums.

13. The notice in the New York statute referred to nothing more than the forfeiture of premiums already paid or the reserve thereon.

POINT V.

It is respectfully urged that the judgment should be reversed.

JULIEN T. DAVIES,
EDWARD LYMAN SHORT,
E. C. HUGHES,
FREDERICK D. MCKENNEY,
Of Counsel for Plaintiff-in-Error.

15617

APPENDIX A.

Opinion of the Supreme Court of the United States in the Hill case, 178 U. S., 347.

Mr. Justice BREWER, after stating the case, delivered the opinion of the Court:

"Here, as in the last two cases, is disclosed a distinct agreement on the part of the insured and the Company to waive and abandon the policy and all rights and obligations on the part of the parties thereto.

But it is said that the insured was not the beneficiary; his wife, and in case of her death, their children, being named as such; and that it was not in his power, by nonpayment or waiver or abandonment, to relinquish or cancel her or their rights in the policy. It is doubtless an interesting question how far the action of the insured can affect or bind the beneficiaries in a life insurance policy. If the answer in this case contained simply the allegation in respect to the insured's agreement with the company. we should be compelled to enter into an examination of that question; but it is alleged, not only that the insured and the company agreed to abandon the contract, but also that the beneficiary, his wife, and the pliantiffs, their children, 'failed, neglected and refused' to pay the premium. So we have a case in which not only did the insured and the company abandon the contract, but also the beneficiaries neglected and refused to do that which was essential to keep the policy in life. The allegation in the answer does not disclose a mere omission, for it is 'neglected and refused', and, of course, there can be no refusal unless with knowledge of the opportunity or duty. A party cannot be said to refuse to do a thing of which he knows nothing. Re-

fusal implies demand, knowledge or notice. The case, therefore, is one in which the beneficiaries refused to continue the policy, while the insured and the company abandoned it.

Under those circumstances we think the case falls within the same rule as the preceding; and the judgments of the Court of Appeals of the Ninth Circuit and of the Circuit Court of the United States of the District of Washington are reversed, and the case remanded to the latter Court, with instructions to overrule the demurrer to defendant's answer."

SUPREME COURT,

STATE OF WASHINGTON.

LARS O. LONE, Administrator of the Estate of Joseph M. Rex, Respondent, v. THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a corporation, Appellant.	No. 4811. Filed Dec. 21, 1903.

Appeal from a judgment rendered in favor of the administrator of the estate of Joseph M. Rex against the Mutual Life Insurance Company of New York, on a policy issued November 8, 1889, upon the life of Joseph M. Rex. Rex paid but one semi-annual premium, which was a condition of the delivery of the policy. He lived for nearly twelve years thereafter, dying on the

1st day of August, 1901, during which time he never paid or offered to pay any premium. The usual allegations in relation to issuing of the policy are made in the complaint, and the further allegation that said insurance policy was to be construed according to the laws of the State of New York. At the time of the issuing of said policy, a statute was in force in said State of New York to the effect, in substance, that no policy should be forfeited for non-payment of any premium unless, at least thirty and not more than sixty days prior to the day when the premium was payable, notice had been mailed to the assured, stating the amount of premium, when due, to whom, and where payable, and that if not paid when due said policy would become forfeited and void; and it is alleged that no such notice was given. The respondent relies upon the case of Griesemer *v.* Mutual Life Ins. Co. of New York, 10 Wash., 202, and the kindred case in 10 Wash., 211, holding that a contract of insurance issued in the State of New York is to be construed with reference to the laws of that state. But whether or not this case falls within the rule and reasoning of the Griesemer cases, *supra*, and whether or not subsequent amendments to the statute in New York could affect contracts entered into under pre-existing laws, are subjects which we deem it necessary to discuss; for, conceding that the contract was to be construed with reference to the New York statute relied upon by the respondent, we do not think the respondent should recover in any event, for it appears that the claim is a stale one When a man neglects for twelve years to make annual or semi-annual payments provided for in an insurance contract, and never in fact makes any deferred payment whatever, in the absence of a showing to the contrary he ought to be held to have rescinded the contract which was made with special reference to such payments, they being in

fact the actual consideration for the performance of the contract on the part of the insurance company. The statute, it is true, provides that no life insurance company shall have power to declare forfeited or lapsed any policy by reason of the non-payment of any annual premium unless notice be given in a specified manner, but a statute must be construed, and its provisions enforced, with reference to its objects; and the legislature, taking into consideration the infirmities of memory, enacted this statute for the purpose of preventing insurance companies from taking what in homely phrase is termed "snap judgment" on its patrons, thereby depriving them of the benefit of contracts by reason of slight negligence on their part, and when there was no real intention to rescind—a beneficent and just law if enforced in the spirit of its enactment, but oppressive and unjust if construed with narrow and literal exactness. This was not a law enacted in the interest of public policy, rights under which could not be waived, but it was made for the benefit of individuals who have power to waive the rights conferred. Statutory rights and even constitutional rights may be so waived.

Cooley's Const. Lim. (6th Ed.), p. 214.

The real question at issue is, was the conduct of Rex such as to warrant the action of the company in declaring the contract rescinded, and proceeding with its business and making its calculations as though the contract were so rescinded. In speaking of a case similar in principle, though somewhat different in facts, the Court, in Smith *v.* New England Mutual Life Ins. Co., 63 Fed., 769, said :

"The assured acquiesced in the company's position —that his policy had lapsed—and accordingly neither paid nor tendered subsequent premiums, but treated the

policy as a security simply for the interest acquired under the statute Had his life been continued the claim now made would never have been urged or thought of; his early death alone suggested it."

We are satisfied that the thought never occurred to Rex during his lifetime that he had a claim against this company on the policy which had been issued so many years before, or, if he did, after the lapse of any appreciable time, it was a dishonest thought, for he knew that he had not performed the duties which devolved upon him under the contract and that he had no rights thereunder; and there seems to be no just reason why his administrator should demand rights which he had virtually waived. In Shutte *v.* Thompson, 15 Wall., 151, where a party was standing upon his statutory right in relation to the notice concerning depositions, the Court said that it was not doubted that all the provisions of the statute respecting notice to the adverse party could be waived by him; that a party could waive any provision either of a contract or of a statute intended for his benefit; and that, if a course of action on his part had misled the other party, he ought not to be allowed to avail himself of his original rights, because under such circumstances he would be availing himself of what was substantially a fraud, and that he should not be allowed to reap any advantage from his own fraud.

This is a mutual life insurance company, and, in the case of Mutual Life Ins. Co. *v.* Phinney, 178 U. S., 327, a case which involves the construction of the statute relied upon here, the Court, without actually deciding the proposition, said:

"Now, whether the insurance company, if the law of New York be applicable, could insist upon a forfeiture without giving the notice prescribed by the statutes of that state, and, enforcing it, forfeit all premiums paid, all obligation for the return of the surrender value, all

right of the insured by subsequent payments to continue the policy in force, is one question. But it is a very different question whether the executrix of the insured, after his long delinquency in the payment of premiums, can enforce the contract as against the other insured parties, thereby diminishing their interest in the accumulated reserve. Ordinarily noone can enforce a contract unless on his part he performs the stipulated promise, and it may be that this rule is operative in this case."

And while the Court declined to decide the question because it was not necessary for the determination of the case, it evidently assumed that the rights of the policy holders in mutual companies were worthy of consideration. So that in this case, this being a mutual life insurance company, the action of Rex, in seemingly abandoning his contract, affects every stockholder in the company, thereby, if he should prevail, diminishing their interests in the accumulated reserve.

From every consideration of justice and fair dealing, we think the respondent should not be allowed to recover in this case. The judgment will therefore be reversed and the cause remanded with instructions to render judgment in favor of the defendant for costs.

DUNBAR, J

We concur:

FULLERTON, J.
HADLEY, J.
MOUNT, J.
ANDERS, J.

C.

NEW YORK PREMIUM NOTICE STATUTES.

L. 1876, Ch. 341 (May 15, 1876).
Amended by
L. 1877, Ch. 321 (May 23, 1877).
Repealed by
L. 1892, Ch. 690, Sec. 295 (took effect Oct. 1,1892).
New statute enacted by
L. 1892, Ch. 690, Sec. 92 (took effect Oct. 1, 1892).
Amended by
L. 1897, Ch. 218 (took effect Apl. 8, 1897).

LAWS OF 1876.

CHAPTER 341.

AN ACT regulating the forfeiture of life insurance policies.

Passed May 15, 1876.

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

SECTION 1. No life insurance company doing business in the State of New York shall have power to declare forfeited or lapsed any policy hereafter issued or renewed, by reason of non-payment of any annual premium or interest, or any portion thereof, unless a notice in writing, stating the amount of annual premiums or interest due and when due on such policy, and the place where said premium or interest may be paid, shall have been duly addressed and mailed by the company issuing such policy to the insured, postage paid, as his or her last known post office address, not less than thirty nor more than sixty days next before such payment becomes due, according to the terms of such policy.

SEC. 2. The affidavit of any officer, clerk or agent of the company that the notice to the assured, provided for in Section one, has been duly addressed and mailed by the company issuing such policy to the assured, shall be presumptive evidence of such notice having been duly given.

SEC. 3. This act shall take effect immediately.

LAWS OF 1877.

CHAP. 321.

AN ACT to amend chapter three hundred and forty-one of the laws of 1876, entitled "An act regulating the forfeiture of life insurance policies."

Passed May 23, 1877.

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

SECTION 1. Section one of chapter 341 of the laws of eighteen hundred and seventy-six, entitled "An act regulating the forfeiture of life insurance policies, is hereby amended so as to read as follows:

SEC. 1. No life insurance company doing business in the State of New York shall have power to declare forfeited or lapsed any policy hereafter issued or renewed by reason of non-payment of any annual premium or interest, or any portion thereof, except as hereinafter provided. Whenever any premium or interest due upon any such policy shall remain unpaid when due, a written or printed notice stating the amount of such premium or interest due on such policy, the place where said premium or interest should be paid, and the person to whom the same is payable, shall be duly addressed and mailed to

the person whose life is assured, or the assignee of the policy, if notice of the assignment has been given to the company, at his or her last known post office address, postage paid by the company, or by an agent of such company or person appointed by it to collect such premium. Such notice shall further state that unless the said premium or interest then due shall be paid to the company or to a duly appointed agent or other person authorized to collect such premium within thirty days after the mailing of such notice, the said policy and all payments thereon will become forfeited and void. In case the payment demanded by such notice shall be made within the thirty days limited therefor, the same shall be taken to be in full compliance with the requirements of the policy in respect to the payment of said premium or interest, anything therein contained to the contrary notwithstanding; but on such policy shall in any case be forfeited or declared forfeited or lapsed until the expiration of thirty days after the mailing of such notice. Provided, however, that a notice stating when the premium will fall due, and that if not paid the policy and all payments thereon will become forfeited and void, served in the manner hereinbefore provided, at least thirty and not more than sixty days prior to the day when the premium is payable, shall have the same effect as the service of the notice hereinbefore provided for.

SEC. 2. The affidavit of anyone authorized by section one to mail such notice, that the same was duly addressed to the person whose life is assured by the policy, or to the assignee of the policy, if notice of the assignment has been given to the company, in pursuance of said section, shall be presumptive evidence of such notice having been given.

SEC. 92. *No forfeiture of policy without notice.* No life insurance corporation doing business in this State shall declare forfeited, or lapsed, any policy hereafter issued or renewed, and not issued upon the payment of monthly or weekly premiums, or unless the same is a term insurance contract for one year or less, nor shall any such policy be forfeited, or lapsed, by reason of non-payment when due of any premium, interest or installment or any portion thereof required by the terms of the policy to be paid, unless a written or printed notice stating the amount of such premium, interest, installment, or portion thereof, due on such policy, the place where it should be paid, andthe person to whom the same is payable, shall be duly addressed and mailed to the person whose life is insured, or the assignee of the policy, if notice of the assignment has been given to the corporation, at his or her last known post office address, postage paid by the corporation, or by an officer thereof, or person appointed by it to collect such premium, at least fifteen and not more than forty-five days prior to the day wheu the same is payable.

The notice shall also state that unless such premium, interest, installment, or portion thereof, then due, shall be paid to the corporation or to a duly appointed agent or person authorized to collect such premium by or before the day it falls due, the policy and all payments thereon will become forfeited and void except as to the right to surrender value or paid-up policy as in this chapter provided.

If the payment demanded by such notice shall be made within its time limited therefor, it

shall be taken to be in full compliance with the requirements of the policy in respect to the time of such payment; and no such policy shall, in any case, be forfeited or declared forfeited or lapsed, until the expiration of thirty days after the mailing of such notice.

The affidavit of any officer, clerk or agent of the corporation, or of anyone authorized to mail such notice, that the notice required by this section, has been duly addressed and mailed by the corporation issuing such policy shall be presumptive evidence that such notice has been duly given.

(The above act in § 295 also repealed the acts of 1876 and 1877.)

LAWS OF 1897.

CHAP. 218.

(This act amended § 92 above as follows:)

"SEC. 92.—NO FORFEITURE OF POLICY WITHOUT NOTICE.—No life insurance corporation doing business in this State shall within one year after the default in payment of any premium, installment or interest declare forfeited or lapsed—any policy hereafter issued or renewed and not issued upon the payment of monthly or weekly premiums, or unless the same is a term insurance contract for one year or less, nor shall any such policy be forfeited, or lapsed, by reason of non-payment when due of any premium, interest or installment or any portion thereof required by the terms of the policy to be paid, within one year from the failure to pay such premium, interest or installment unless a written or printed notice stating the amount of such premium, interest, installment, or portion thereof, due on such policy, the place where it

shall be paid, and the person to whom the same is payable, shall have been duly addressed and mailed to the person whose life is insured, or the assignee of the policy, if notice of the assignment has been given to the corporation, at his or her last known post office address in this State, postage paid by the corporation, or by any officer thereof, or person appointed by it to collect such premium, at least fifteen and not more than forty-five days prior to the day when the same is payable. The notice shall also state that unless such premium, interest, installment or portion thereof, then due, shall be paid to the corporation, or to the duly appointed agent or person authorized to collect such premium by or before the day it falls due, the policy and all payments thereon will become forfeited and void except as to the right to a surrender value or paid-up policy as in this chapter provided. If the payment demanded by such notice shall be made within its time limited therefor, it shall be taken to be in full compliance with the requirements of the policy in respect to the time of such payment; and no such policy shall in any case be forfeited or declared forfeited, or lapsed, until the expiration of thirty days after the mailing of such notice. The affidavit of any officer, clerk, or agent of the corporation, or of anyone authorized to mail such notice that the notice required by this section has been duly addressed and mailed by the corporation issuing such policy shall be presumptive evidence that such notice has been duly given. No action shall be maintained to recover under a forfeited policy, unless the same is instituted within one year from the day upon which default was made in paying the premium, installment, interest or portion thereof for which it is claimed that forfeiture ensued.

SEC. 3. This act shall take effect immediately."

ILE COPY. 166
518

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1902.

Ex Parte THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a Corporation, *Petitioner*

Petition for Writ of Certiorari, requiring the Circuit Court of Appeals for the Ninth Circuit to certify to the Supreme Court for its Review and Determination, the case of the Mutual Life Insurance Company of New York, Plaintiff in Error.

vs.

ELIZEBETH MAUD HILL, GEORGE E. HILL, by his Guardian, EBEN SMITH, et al.
Respondent.

BRIEF OF RESPONDENT.

S. WARBURTON,
Attorney for Respondent.

HAROLD PRESTON
EBEN SMITH
Of Counsel.

P. A. BECK & CO., PRINTERS.

IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1902.

Ex Parte, THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
a corporation, Petitioner.

Petition for Writ of Certiorari.

The petitioner does not pretend to say or to show that there is any question of public importance or of treaty rights involved in the decision of the lower court. It simply claims that the lower court committed an error in deciding the case against it. In fact it would be impossible for petitioner to show that there was any question of public importance, etc., involved in the decision of the lower court. I think no case can be found where there are fewer questions of public importance involved than in this case. The law of this case has been settled by a former decision of the Circuit Court of Appeals, together with the decisions of the United States Supreme Court in the cases of

The Mutual Life Insurance Company vs. Phinney, 178 U. S., 327.

The Mutual Life Insurance Company vs. Sears, 178 U. S., 345.

The Mutual Life Insurance Company vs. Hill, 178 U. S., 347.

The Mutual Life Insurance Company vs. Allen, 178 U. S., 351.

The Mutual Life Insurance Company vs. Cohen, 179 U. S., 362.

Every question raised or urged before the Circuit Court of Appeals on its second hearing, was urged in the former case and cases. Every question now raised was fully presented and argued before this Court on the former hearing of this case, together with the cases above cited. All these cases were argued at practically the same time, and while there are different decisions, they are practically the same decision, because every question urged in the one case was urged and argued in the other.

In addition to this it will be remembered that in 1897 the legislature amended the law of New York so as to apply only to cases where the assured or assignee had a P. O. address in New York. No case is liable to arise where there is a diversity of citizenship so as to give this Court jurisdiction. In addition to this the Supreme Court of New York recently decided a case which settles many questions as to the proper construction of the Statute of New York.

In call the Court's particular attention to the case of Strauss vs. Insurance Company, 67 N. Y. S., 509, which decision was affirmed in 70 N. Y. S., 1149. It will be necessary to read the decision in 67 N. Y., 8, to get a full statement of the facts. This case was affirmed recently by the New York Appellate Court, 63 N. E., 347.

We will discuss the various points raised by petitioner under the following heads and will give the page where the discussion will be found:

STATEMENT OF CASE.

I.

The decision of the Circuit Court of Appeals on the first hearing of the case was the law of the case on the second hearing in so far as it was not reversed or criticized by the decision of this Court. Page ..9...

II.

This Court held in the Cohen case that provision in a contract which clearly showed an intent to make the contract subject to the laws of another state was binding. The Hill contract contains such a clause. Page ..15..

III.

The insurance company was estopped and is estopped from claiming or showing or attempting to show that the contract was not actually made in New York. It was not competent for them to show that the contract was made in a place other than the agreed one in the contract. Page ..24

IV.

The acts, declarations, statements or agreements on the part of the assured are not binding on the beneficiaries. Page 28...

V.

Where parties to a cotnract make the place of contract

in a state different from that of the place where the contract is delivered, they cannot by an agreement in the contract waive a public policy statute of such state. P. 36

VI.

The contention that the statute of New York of 1877 applies to only one default is not well taken. Page ..45..

VII.

This action is not in the nature of a specific performance where parties have failed to meet the obligations of the contract. No premium was due until the statutory notice was served. This is the decision of every Court that has passed upon this question. Page..50..

STATEMENT OF THE CASE.

This action is based upon a policy of insurance, issued by the petitioner to the plaintiff in error on the life of George Dana Hill, payable to his wife, and in case of here prior death, then to their children. The complaint alleged the issuance and delivery of the policy, together with plea of performance. Petitioner answered alleging in the defense the non-payment of the premium, and that the insured, George Dana Hill had neglected and refused to pay the premiums, and that he and the Company had agreed to abandon and terminate the contract, also that the beneficiaries had likewise neglected and refused to pay the premiums.

The defendants in erro r interposed a demurrer on the ground that the policy was a New York contract, and that the Insurance Company had not alleged that they had

served a statutory notice of New York on any of the alleged defaulted premiums; that the service of the statutory notice was a condition precedent to the collection of premiums, and the policy for that reason was a continuing and existing contract at the time of the death of Mr. Hill. The Lower Court sustained the demurrer, and the same was appealed to the Circuit Court of Appeals, which affirmed the judgment. The case was then removed to this Court on a writ of certiorari. This Court reversed the Circuit Court of Appeals and the Circuit Court, on the ground that the pleadings showed that George Dana Hill and the Company had agreed to terminate the contract, *and that the beneficiaries had failed and neglected and refused to pay the second premium.*

See Insurance Company vs. Hill, 178 U. S., 347.

It will be remembered that there was a cluster of cases in which the complaints were similar, and the defences similar, all triel before this Court as practically the same case. See cluster of cases *supra.* This case was decided in this Court on the same day that the Phinney case was decided in which case the Court held it was competent for the parties to the contract to terminate it without the service of the statutory notice of New York, by an agreement made between them on a day subsequent to the due date of the premium, where it clearly appeared that it was the intention of the parties to do so. When the case reached the Lower Court, petitioner amended its answer but set up no defense not made in their former answer. Plaintiff denied the allegation in reference to the beneficiaries and the termination of the contract by agreement between them. The petitioner wholly failed to prove any

of the allegations of its answer in refernce to an abandonment or rescission of the contract.

It was claimed before the Lower Court and is claimed here in their petition that the declarations, statements and agreements of George Dana Hill, father of respondents, was binding on the beneficiaries. They showed by their evidence that they made a requst of Mr. Hill to pay the premium and that he neglected to pay it. This fairly states all the evidence on the question of abandonment. The record is equally clear that the Company made no such demand on any of respondents, who at that time were minors, or upon their guardian, Eben Smith, and it clearly appears that neither Eben Smith, their guardian nor any of the children had any knowledge of the non-payment of any premium. It admitted that the Company never ser- nor attempted to serve the notice, required by the statute of New York.

The language of the Cohen case, "that there was no suggestion of a recision, abandonment or knowledge by the beneficiary of the non-payment of the premium or any refusal or failure on her part in respect to the policy and that if the policy was a New York contract then the plaintiff was entitled to recover," applies with equal force here.

Respondents contend: 1. That the contract in question is a New York contract made so by the express terms of the contract for it is stipulated "that this contract of insurance when made shall be held and construed at all times and places to have been made in New York."

By a preceding provision of the application it makes the assent of the assured to the above clause a condition precedent to its accepting or entertaining the claims.

2. That the declarations and statements of Mr. Hill are not binding upon the beneficiaries.

3. That the clause in the policy attempting to waive the notice required by the New York law is ineffectual. The Supreme Court of New York in a recent decision said in reference to a note given in payment of a premium overdue, which note provided that a failure to pay the note *without notice* to any party or parties interested therein the policy should be null and void, was ineffectual. It uses this language, "It, (the note), has to be coupled with a like condition to the policy itself. That the policy shall be null and void on failure to pay any premium or note given therefor on the day it becomes due and can be given no greater force. The statute limits the provision of such agreement of forfeiture so that they can only take effect after the statutory notice is given." This case was affirmed in the New York Court of Appeals, 63 N. E., 347.

Strauss v. Ins Co. 67 N. Y. L. 509

The petitioners contest the position taken by respondent and claim that the Court held contrary to us on the former decision of this case together with the cluster of cases heretofore mentioned. There are but three decisions rendered in this cluster of cases, the Phinney, Hill and Cohen cases.

PHINNEY CASE.

The Court held in this case after first referring to the fact that there was involved a primary question as to whether the contract subjected itself in express terms to the operation of the New York law and whether the notice law of New Yory was in effect an amendment or the charter of the Company

Held—That where the insured himself was the beneficiary, his statement that he would not pay the premium when requested to do so by the Company, and his refusal to pay it, would amount to a termination or abandonment of the contract. It mentioned the fact that it had not overlooked he question whether or not in a contract with a Mutual Insurance Company a party could recover where there had been successive defaults but did not decide it.

HILL CASE.

This Court held in the Hill case that the allegation that plaintiffs (beneficiaries), had neglected and refused to pay the premium amounted to an allegation of demand on the beneficiaries on the part of the Insurance Company for the premium. That if the Insurance Company showed such a demand and refusal on the part of the beneficiaries to pay, it would make a good defense. It also sugge[illegible] that the question was raised whether or not the declarations of the insured would be binding upon the beneficiaries. It said it was an interesting question, but did not find it necessary to decide it.

COHEN CASE.

In the Cohen case the Court did decide every question left open in both the Phinney and Hill cases. This Court held:

1. That a clause in an application providing "it was made subject to the charter of the Company and the laws of New York," referred to the application only, but did not make the contract a New York contract.

2. That the statute was not an amendment of the charter of the Company.

3. That a clause in a contract similar to the one in this case did make it a New York contract.

4. That the statements and declarations of the insured did not bind a beneficiary.

It held against every other claim of petitioners then made or now made in the following way. So this court having held in the Cohen case that where a contract provided that "it was a contract made and to be executed in New York in the State of New York and to be construed according to the lafs of that state," it made it a New York, and this Hill contract providing that, "it should be held and construed at all times to have been made in New York" and further provided that, "it was made subject to the charter of the Company and the laws of New York," the decision of this Court sustains our contention that the Hill contract was a New York, and when we further mentioned that this court held affirmatively or negatively that, if such a contract was a New York contract then the notice law could not be waived, that declarations of the insured would not be binding on the beneficiary and against all other contentions of petitioner now urged, as we have shown and will more clearly show, we must come to the conclusion that the Circuit Court of Appeals was right when it said the decision of this Court upon all other points in the case not being criticised or reversed is the law of the case for this Court, we will now discuss the several points raised by petitioner in petition and brief.

THE CIRCUIT COURT OF APPEALS PROPERLY HELD THAT ITS FORMER DECISION WAS

BINDING UPON IT AS THE LAW OF THE CASE IN SO FAR AS ITS FORMER DECISION WAS NOT REVERSED OF CRITICISED BY THIS COURT.

It is well established by all the authorities that the decision of an Appellate Court on a former appeal is binding on the same Court on a second appeal as the law of the case. This rule is as applicable to the Circuit Court of Appeals of the United States as they are Appellate Courts within the meaning of the rule. It has been so decided by nearly all, if not all, the various Courts of Appeal. This rule must apply in all cases in those Courts except in a case which is removed to the Supreme Court of the United States by one of the various recognized methods. In such an event, all points directly and necessarily decided adversely to the appellant by a Circuit Court of Appeals must remain the law of the case except in so far as reversed by the United States Supreme Court.

The fact that this Court takes a case by writ of certiorari and disagrees with a Circuit Court of Appeals on one of a dozen points raised in both Courts cannot change the rule as to the other eleven points decided by the Circuit Court of Appeals, which are not criticised or adversely commented upon. The fact that this Court reversed the Court of Appeals on one of a dozen points cannot open the case on the other eleven points not decided or commented upon. This seems to be conclusively the correct rule when it is remembered that it must necessarily be assumed by this Court and by all the litigants that the case is going back to the Circuit Court on the combined decision of the Circuit Court of Appeals and this Court, the decision of the Circuit Court of Ap-

peals being binding on the Circuit Court except as modified by the Supreme Court. Great force is added to this contention when it is remembered that it is only in rare instances and in cases of great public importance that this Court takes jurisdiction by writs of certiorari when, as in this case, the jurisdiction of the lower Court depends on the diversity of citizenship of the parties. It must also be assumed that the Supreme Court taking jurisdiction in such cases will decide every such important question which alone gave it the right to take jurisdiction at all.

More than this, this Court would expect and presume that a Circuit Court of Appeals would adhere to its rule and decision on a second trial which it had decided on a former hearing, after mature and careful consideration, to be good law, unless it clearly reversed it. This being true, this Court would in all cases where it exercises its discretion in that class of exceptional cases, decide every point in which it differed with the Circuit Court and the Circuit Court of Appeals, so that the Circuit Court and Circuit Court of Appeals could not fail to decide the case correctly and avoid the necessity of its again using its exceptional writ.

It certainly would be of great advantage to both the litigants and to the lower Courts, it being of such importance to all. We believe this rule to be correct in principle and also in the actual practice of this court.

It is the desire of all Courts to end litigation as early as possible, both for its own benefit and for the benefit of the litigants, in order that the expense of the litigants may cease and the party in the right may reap the benefits of the litigation and end his vexatious troubles.

We understand it is the practice of Appellate Courts in reviewing a decision of an inferior Court to always decide every question in the case with which it disagrees with the Lower Court, in order that the Lower Court may again try the case correctly. This is the basis of the rule of the law of the case. Most Courts go to the extent of holding that not only the points decided adversely to the appellant become the law of the case, but that every point that could have been properly raised and not raised on the first appeal must be held to have been waived by the appellant.

The Civil Court of Appeals of Illinois, 38th Appellate Court Reports, Ill., page 55, holds that it is an Appellate Court within the meaning of the rule, and held that its decision on a former hearing from which an appeal had been taken to the Supreme Court, and by it reversed, was still the law of the case on the second appeal on those points that the Supreme Court did not criticise or suggest were erroneous. This decision is of much importance in this, that the Court of Appeals of Illinois is not in most cases a Court of last resort, but each party has a right to appeal from its decisions to the Supreme Court in the majority of cases decided by it. Its language is as follows:

"It will not be necessary for us to make any further statement of the case or the facts therein than will be found in our former opinion, except only so far as there hase been some little change of the facts and status of the case. The questions as to the sufficiency of the allegations of the petition and of the contract were passed on by this Court when the case was formely here, and when the case went to the Supreme Court no objection was found to that part of the opinion, and, as far as this Court is concerned, these questions are res adjudicata, and we will refer to our former opinion for our decision on those points."

The Circuit Court of Appeals, 101 Fed. Rep., 198, Fifth Circuit, states the rule as follows:

"'It is a well established doctrine in the federal Courts at least that a second writ of error or a second appeal in the same case only brings up for review proceedings of the Trial Court subsequent to the mandate, and that it does not authorize a reconsideration of any question, either of law or fact, that were considered and determined on the first appeal or writ of error, provided the testimony on each trial was substantially the same. This doctrine results from the fact that a judgement rendered by an Appellate Court in a given case is conclusive on the parties thereto, and that an Appellate Court, like a nisi prius Court, is powerless to review or revise its own judgments after the lapse of a term at which they were rendered, except in cases of fraud. Another form of stating the doctrine is that propositions of law which were considered and decided on the first appeal become the law of that particular case, and, whether right or wrong, must be adhered to on a second appeal.'"

This Court has held in numerous decisions that on second appeal every question decided on the former appeal becomes the law of the case and is no longer open for furthr review by this Court. It was said in the case of Supervisors vs. Kennicott, 94th U. S., 498, that, "It is settled in this Court, that whatever has been decided here upon one appeal cannot be re-examined in a subsequent appeal of the same suit. Such subsequent appeal brings up for examination only, the proceedings of the Circuit Court, after the mandate of this court."

Matters necessarily involved in the determination of a question on appeal are settled by the decision when the same are gain presented on a subsequent appeal.

So the decision upon a prior appeal where the question presented on a second appeal was necessarily involved

in the prior decision.

Hutchinson vs. Chicago & N. W. R. Co., 41 Wis., 541.
Downer vs. Cross, 2 Wis., 371.
Bangs vs. Strong, 4 N. Y., 315.
Headly vs. Challis, 15 Kan., 602.
Crockett vs. Gray, 31 Kan., 346.
National Park Bank vs. Hass, 49 N. Y. S., 772.
Hollowbush vs. McConnell, 12 Ill., 203.
Eversdon vs. Mayhew, 85 Cal., 1.

The Seventh Circuit Court of Appeals in the case of Supreme Lodge vs. Lloyd, 107 Fed., p. 70, states the rule in this way:

"Upon an exception to the refusal of the Court to give a special instruction, we are asked to review the ruling, and authorities are cited which it is contended demonstrate right of the order under such a contract to adopt by-laws which shall exempt it from liability though the death result from a pre-existing cause. * * * If the cases cited had been brought to our attention upon a petition for a rehearing, we could have given these decisions their just weight, but now it is too late to consider them. The ruling made became, for this Court and the Circuit Court at least, the law of the case. If error was committed, it can be corrected in the case, if at all, only by the Supreme Court."

The Fifth Circuit Court of Appeals in considering a case on a second appeal where it seemed in doubt whether its former decision was in conformity to a decision of the United States Supreme Court says: "But it is not necessary to further alaborate this question, as it is res adjudicata in this Court."

The Court of Appeals of Kentucky (Penticost vs.

Ins. Co., 61 S. W., 29), states the rule in this language:

"We have on this appeal the identical case which was decided on the former appeal. Every point suggested and every argument now made could have been made at that time; and under a rule of long standing in this Court the law as announced in that opinion is the law of this case. For the reasons indicated, the judgment is affirmed."

II.

THIS COURT HELD IN THE COHEN CASE THAT A PROVISION IN A CONTRACT WHICH CLEARLY SHOWED AN INTENT TO MAKE THE CONTRACT SUBJECT TO THE LAWS OF ANOTHER STATE, WAS BINDING.

I do not see how it can be fairly contended that this Court held contrary to the decision of the Circuit Court of Appeals on the question of the place of contract. In fact, the decision of this Court in the Cohen case clearly sustains our view. The application in the Hill policy contained the agreement that "it was made subject to the charter of the Company and the laws of New York." This is the identical provision in the Cohen case, and if this were all there was in the Hill contract tending to show it was the intention of the parties to make it a New York contract, we would admit that the Cohen case was against us on this point. But this is not all. Immediately preceding the clause containing the contractual part of the application is this clause:

"The following declaration and agreement must be

signed by the person whose life is proposed for insurance."

This clause singles out and makes prominent the matter following it. It clearly appears from this that the matter following it was deemed by the Company as of the greatest importance. The Company makes the provision following a condition precedent to its accepting or considering the application. This is, in part, the provision referred to:

"It is agreed that there shall be no contract of insurance until the policy shall have been issued and delivered by the said Company and the first premium thereon paid while the person proposed for insurance is in the same condition of health described in this application, *and the contract of insurance when made shall be held and construed at all times and places to have been made in the City of New York.*"

This is the very meat of the contract. This is the application prepared by the Company for its prospective policy holders. It thus carefully provides when and at what time in the history of the negotiations the contract shall take effect, but at the same time it clearly and explicitly provides that, no matter when or where it takes effect, it shall take effect as if actually made and delivered in the city of New York.

I ask, in all fairness, what language the Company could have used which would more clearly and explicitly show the intent on the part of the Company to subject the contract to the laws of New York? This Court, in the Cohen case, 178 U. S., 262, while holding that a provision in the applica'ion was that "it was made subject to the charter of the Company and the laws of New York,," did

not make the policy issued upon such application a New York contract, but shows intent to make the application only subject to the laws of New York. It says:

"The provision referred to and which is stated at length in the succeeding part of this section, is one for a notice of a special kind, and to be given in a particular way. * * * * * Undoubtedly a foreign insurance company, making a contract within the state of New York, would find the contract burdened by its provisions. * * * * * It is not doubted that a contract by an insurance company of New York executed elsewhere may be its terms incorporate the laws of New York, and make its provisions controlling upon both the insured and the insurer. And it is argued that, although there is nothing in the policy to indicate this, the language of the application has that effect. It recites that it is subject to the charter of such company and the laws of said state. * * * But that is very different from a provision that the contract issued upon such application should also be in all respects controlled by the laws of New York. * * * The stipulation in this policy is different from that presented in the Court of Appeals of New York in Baxter vs. Brooklyn L. Ins. Co., 119 N. Y., 450, 7 L. R. A., 293, 23 N. E., 1048, which was that 'it was a contract made and to be executed in the state of New York, and construed only according to the laws of that state.' There was a direct provision in respect to the contract itself, and thus incorporated those laws into its terms."

It cannot be doubted that this Court means in this decision that a contract containing such a provision in its policy would make it a New York contract. To us it seems as clear as day that not only has this Court failed to criticise the Circuit Court of Appeals on this point, but that in the Cohen case it clearly and affirmatively holds that this provision would make this policy a New York contract. What other possible meaning could the Company intend that the above provision and agreement should have? If it does not mean that the contract should be deemed to

have been written, signed and delivered in New York and controlled by the laws of New York, it certainly does not mean anything. It does not mean that it should be deemed that the contract was prepared and signed in New York, because these two things do not determine the place of contract or determine anything at all in relation to the contract so far as the rights of the parties are concerned.

This provision should be construed in the light of what the parties would actually mean and understand by inserting such a provision in the contract. How would Mr. Hill and the beneficiaries understand it? Can there be any doubt that the insured would so understand this provision? If there was any provision in the New York law to the benefit and advantage of the Insurance Company in this case, would it not be claiming that by this agreement they made their policy a New York contract? If there is any doubt about the meaning of this provision, then it must be resolved in favor of the insured.

If it is competent for the parties to stipulate that the contract of insurance should be controlled by the laws of New York, then it is competent for them to agree as a fact, a fact which if proved, would make it a Ne work contract, and certainly the parties would adopt language most appropriate to express that intent. It must not be forgotten that this agreement was made at a time when it was in the power of the contracting parties to have the contract actually made in the state of New York. The Company could have required the premium to accompany the application, then accept the application, issue the policy, and mail it in New York, direct to Mrs. Mill, or hold the policy when issued until it received the premium in New York, and then

mail the policy to Mrs. Hill, or Mrs. Hill could have required the delivery of the policy to her by mail from New York, upon her paying the premium in New York. Under such circumstances, no one would claim that the policy was not a New York contract.

This not being convenient, the parties did what it was competent for them to do—agreed that the contract when made should be held and construed at all times and places to have been made in New York. This Court, in the Cohen case, said:

"While the contract is based upon the application yet the latter is only a preliminary instrument, approved on the part of the insured, and a stipulation that it shall be controlled by the charter and the laws of the state is not tantamount to a stipulation that the policy issued thereon shall also in like manner be controlled. * * * * * But that is very different from a provision that the contract, issued upon such application should also be in all respects controlled by the laws of New York."

The provision here, it will be noticed, meets the suggestion that it was not the application but the contract when made, which should be construed at all times and places to have been made in New York.

The words "contract when made," as used in the application, mean a contract when signed and sealed and delivered and everything done necessary to be done in order to make it a complete and binding contract on all parties.

Mr. Anderson in his law dictionary defines the word "make," of which "made" is past tense, as follows:

"To sign, seal and deliver; to execute as, to make a deed, bill, note. The maker of a note is one who has executed and delivered the note."

When we speak of one who has made an assignment, we mean an assignment that has been executed and delivered. Mr. Abbott in his law dictionary defines "make" as follows:

"To make a contract is to agree, or if a written contract is contemplated to execute the paper with the requisite formalities and usually to deliver it as binding."

"Make" spoken of in writing inter partes usually implies delivery; ordinarily the expression, made a note, imports that it was not only signed but delivered as an obligation. The instrument has no inception when the subscriber retains it for future disposal. "An averment in a declaration of complaint of the making of a promissory note includes delivery to the payee. Chapell vs. Bissell, 10 How. p. 274. 2 Cowen 536. An averment that defendant made the note in suit is equivalent to saying that he signed it and delivered it to the payee. Sawyer vs. Warner, 15 Barb., 282. To the same effect is Woodruff vs. Dorwin, 3 Vt., 82, 5 Vt., 500. Also Gould on Pleading, 821. Chitty on Pleading, 257."

Several courts have passed upon policies using the identical language of this contract, and have uniformly he held that such language would designate the place of contract, and make the laws of such state a part of the contract, and that a provision in such policy, attempting to waive a public policy statute in force in the state of the agreed place of contract, is void, and of no eeffet. We will quote from some of them on the question of place of contract.

"The policy of insurance provided that it was accepted upon the further conditions and aggreements contained on the following page which are made a part of this contract *and which contract shall be held and construed to have been made in the City of Cincinnati, Ohio.* The contract of insurance having been made with reference to the laws of the State of Ohio, the plaintiff had a right to

rely upon them in enforcing his contract so far as they related to its validity, nature, interpretation and effect. Bank vs. Rickman, 16 Grat., 126, 127; Corbin vs. Bank, 87 Va., 665, 13 S. E. 98; 3 Minor Inst., 145; Story, Conf. Laws, Secs. 263,280.

Union Central Life Insurance Company vs. Pollard, 26 S. E., 421.

"As we have said, it is argued that the policy in suit is a New York or Nebraska contract, and that there is no such law as that above set forth in either of these states. The policy was signed by the president and the secretary of the company, in the City of New York. The premium was made payable there and the amount of the policy was to be paid, in the event of the death of the assured, at the City of New York. *It was expressly agreed that the policy should be construed to have been made in the State of New York.* It was therefore a New York contract, and it is to be governed by the laws of that state. Richards, Ins., 44."

Goodwin vs. Ins. Co., (Iowa) 66 N. W., 157, p. 160.

There can be no doubt that this policy is to be construed according to the law of Pennsylvania.' It is expressly provided in the application, which is made part of the policy, that '*the place of contract shall be the City of Philadelphia, State of Pennsylvania.*' In Weyman vs. Southard, 10 Wheat., 1-48. Chief Justice Marshall stated it to be a principle of universal law that 'in every forum a contract is governed by the law with a view to which it is made.' See Pritchard vs. Norton, 106 U. S., 124,136, 1 Supt. Ct. 102, and cases there cited. In this case no necessity exists for presumption from the circumstances, because the intention of the parties is expressed."

Penn. Mutual Ins. Co. vs. Savings Bank, 72 Fed., 413 on p. 418.

"It was also stipulated that the *said contract should be construed and governed by the laws of the State of*

New York. The Court held that under that provision the contract was dominated by the notice law of New York."

Johnson vs. Ins. Co., 78 N. W., 905.

"Mrs. Hume was confessedly a contracting party to the Maryland policy; and as to the Connecticut contracts, the statue of the state where they were made and to be performed, explicitly provided that a policy for the benefit of a married woman shall enure to her separate use or that of her children; but if the annual premium exceed three hundred dollars, the amount of such excess shall enure to the benefit of the creditors of the person paying the premiums.

"The rights and benefits given by the laws of Connecticut in this regard are as much part of these contracts as if incorporated therein, not only because they are to be taken as if entered into there, but because there was the place of performance, and the stipulation of the parties was made with reference to the laws of that place."

Bank of Washington vs. Hume, 128 U. S., 195.

...."*This policy is a contract made and to be executed in the state of New York,* and shall be construed only according to the character of the company and the laws of that state." From which is clearly appears that it was the intent of the parties to locate the place of its execution in the State of New York. Especially does this appear to have been the intention of the defendant. The provision above quoted appears as a part of the printed form of the policy issued by the company. It could have been inserted therein only after full consideration, and its insertion could have had but one object, and that was to bring the policy as fully within the terms of the State of New York as though it had been actually executed and delivered therein. This was done for the benefit of the Company, and it must abide the results flowing therefrom. In our opinion sufficient appears upon the face of the policy to require us to construe it as though it had been actually executed and delivered in the State of New York. It must follow that the statute in question must be given force in determining rights founded thereon."

Gnesemere vs. Ins. Co., 10 Wash., 202.

The Supreme Court of Missouri in the case of Cravens vs. the New York Life Insurance Company, 50 Southwestern 519, uses this language:

"The rule to be deduced from the authorities seems to be that, when no statute intervenes prohibiting it, a corporation doing business by permission of another state from that of its corporation may by contract make the law of the state of its incorporation the applicatory law of the contract, but that, when the laws of the state in which it does business by license prohibits such corporations from making certain kinds of contracts, they can only act in accordance therewith."

In addition to this the Company is a New York corporation, with its principal place of business in New York City. It signed and executed the policy in the State of New York. The policy was prepared by the Company in New York, and it provided that the contract in every particular should be performed in New York. The policy was to be paid there—the proofs of death were to be delivered there—and the premiums were to be paid there. Justice Harlan in the case of Coghlan vs. the Railway Company, 142 U. S., page 101, says:

"The parties had a view to the laws of England. The law of the place can never be the rule when the transaction is entered into with an express view of another country as the rule by which it is to be governed. Now, here the payment is to be in England; it is an English security and so intended by the parties.

Referring to these and many other cases, this Court, speaking of Justice Matthews, held, upon full consideration, in Pritchard vs. Norton, 106 U. S., 124, 136, that the law upon which the nature, interpretations and validity of the contract depend, are either expressly or presumptively, incorporated into it as its obligations."

Again this Court in the case of London Assurance Co., vs. Companhia de Moagens De Barreiro, 167 U. S., 149 said:

"Under the circumstances we think that this contract of insurance is to be interpreted according to English law. The appellant is an English Company. It made the contract in Philadelphia, by its agents, and that contract by its terms was to be prerformed in English. * * * This is what the parties expressly stipulated for, and it is no injustice to the Company to decide its rights according to the principles of the law of the country which it has agreed to be bound by so long as, in a case like this, the foreign law is not in any way contrary to the polciy of our own."

III.

THE PETITIONER, THE INSURANCE COMPANY, WAS ESTOPPED FROM CLAIMING OR ATTEMPTING TO SHOW THAT THE CONTRACT WAS NOT ACTUALLY MADE IN THE STATE OF NEW YORK. IT WAS NOT COMPETENT FOR THEM TO ATTEMPT TO PROVE THAT THE CONTRACT WAS MADE AT ANY PLACE OTHER THAN IN THE STATE OF NEW YORK, THE AGREED PLACE OF CONTRACT.

We do not see how it can be claimed that the parties did not intend by this agreement to make the place of contract in the state of New York. What other possible purpose can the provisions have or be intended to have. The company, in the printed form of the application, had already provided that the application should be subject to the charter of the Company and the laws of New York so it could not refer to the application alone, but clearly shows that it was intended to make the whole contract when com-

pleted subject to the laws of New York. It says: "The contract was made," this means when completed, when it becomes binding on all parties. "Shall be construed at all times and places to have been made in New York," means it shall be construed by all parties in Court and out of Court as a New York contract. It amounts to an agreed fact as to the place of contract upon which both parties shall act in consummating the contract. Suppose the attorneys in this case had submitted it to the Court upon an agreed statement of facts, one of which was that the contract was made in New York. Would not the Court be compelled to hold it a New York contract? Yet such an agreement should not have any more, nor as much, controlling effect as this agreement, because, based on this agreement, the Company bound itself to pay the beneficiary $20,000 at Mr. Hill's death, and on the part of Mrs. Hill to pay $814, or suffer forfeiture, to secure the covenants of the insurance company. The contract was finally made on the faith of this agreement as a basis of the contract at a time when neither party need go on with the consummation of the contract unless this provision was to have a binding effect and force. That such was the intention of the parties, at least, the Insurance Company at that time, cannot be doubted. A layman would so understand the language of the agreement. So would those skilled in the law because it is the language ordinarily used in speaking of the place of contract. Either party at the time this agreement was made could have required the delivery of the contract in New York, and thus made it a New York contract. Having made this agreement, it is fair to assume that both parties relied upon it in fixing the laws of New York as applicatory law and regarded it unimportant where the delivery

should actually take place. Bigelow on Estoppel, states the rule as follows:

"The first class of cases under the head of Estoppel by Contract, as stated in the preceding chapter, arises where there is an actual or a virtual undertaking to treat a fact as specifically settled. Stated in full, the general rule of law appears to be this: A fact agreed or assumed to be true, as the basis of a contract must be taken to be true specifically, until the contract itself is lawfully impeached by plaintiff or defendant, or until some legal proceeding is taken to impeach the truth of the (supposed) fact; assuming that the contract itself is not contrary to law. In other words, supposing the contract to be lawful and binding, the party or parties, (it may be one, it may be all) pledging or justly assuming the act in question will be estopped from taking any position, to the detriment of other parties, inconsistent with the special fact, except for the purpose of reforming the language of a written contract and making it conform to the rule of this agreement. The rule may be illustrated by two or three examples. Thus dealing with a person that occupies a particular position or character, it may be as administrator, executor, trustee, director, agent, or holder of any manner of office, will estop that person, generally speaking, to deny the fact agreed or assumed in regard to his position or character. So a contract based upon one's having a certain title to property will estop the parties, or the party pledging the fact if it be the act of but one, in the performance of the contract, from claiming a different title. And so accepting and treating an article in shipment as baggage may estop owner and carrier from treating it as freight."

Bigelow vs. Estoppel, 5th Ed. 459.

"It is a sound rule of law that a written contract cannot be altered or varied by parol proof. This excellent rule of law is intended to guard against fraud and perjuries, and cannote be too steadily enforced and supported by Courts of Justice. * * * This rule prevails equally in a Court of Equity and a Court of law. Generally speaking, the rules of evidence are the same in both Courts, and if words of a contract be intelligible there is no instance

where parol proof has been permitted to give them a different sense. You can introduce nothing on parol proof that adds to or deducts from the writing. If, however, through fraud or mistake, it is made to speak a different language from what was intended, the estoppel does not apply. These are the only cases that form an exception to the rule. * * * Notwithstanding these matters, the parties to a deed or a contract may agree to bind themselves in this respect by stating a particular state of things as a part or basis of the grant or contract. And when this thing is done with sufficient clearness as to leave no doubt as to the intention, it falls within the general principles that matters which have been solemnly reduced to writing cannot be denied, and constitute an estoppal by deed.

Herman vs. Estoppal, p. 708, Sec. 575.

"That the doctrine of estoppal in pias is a most equitable doctrine and one without which the law of the country could not be satisfactorily administered."

"When a person makes to another the representation, 'I take upon myself to say such and such things do exist' and the other man does really act upon that basis, it seems to me it is of the very essence of justice that, between those two parties, their rights should be regulated, not by the real state of the facts, but by that conventional state of facts which the two parties agree to make the basis of their action."

Herman on Estoppal, Sec. 1170.

Wharton on evidence states the same rule in this language:

"If a distinct statement of a particular fact is made in the recital of an instrument under seal, and a contract is made with reference to that recital, it is clear that, as between the parties to such instrument and in an action upon it, it is not competent for the party bound to deny the recital."

Id. Sec. 1039.

"We must, however, again emphasize, as bearing on both admissions of rights and admissions of facts, the radical distinction already noticed, between admissions which are contractual and dispositive, and such as are non-contractual and no-dispositive; in other words: between admissions made intentionally, for the purpose of transferring a right, and admissions made causally, for the purpose of narrating an incident, or explaining an alleged right. The contractual and dispositive admission is equivalent to an offer which, when accepted by the other party, makes a contract. Such an admission, as we will presently see, when made as the basis of contract cannot be revoked."

Id. Section 1083.

"In this view, a party making such a statement, thereby inducing another to enter into a contract with him, is bound to such other by such statement, whether it be true or false. A person, for instance, falsely claiming to be an agent, cannot dispute his statement when sued on it by a party acting on his pretension. A party warranting cannot escape liability by claiming that his warranty was false. Even an honest misstatement, by which the other contracting party is led to enter into a contract, binds the party by whom the misstatement is made."

Id. Section 1087.

"Hence where parties have knowingly agreed to act upon an assumed state of facts, their rights will be made to depend on such assumption and not upon the truth."

Id. Section 1146.

IV.

THE ACTS, DECLARATIONS, STATEMENTS OR AGREEMENTS ON THE PART OF THE INSURED CANNOT PREVAIL AGAINST THE BENEFICIARIES IN A POLICY OF LIFE INSURANCE.

The Circuit Court of Appeals on the first hearing of

this case held that the statements, declarations and agreements of Mr. Hill, relative to an abandonment of the contract, was not binding upon the beneficiaries. This point was urged by the petitioner at considerable length at the former hearing in this Court. This Court in its opinion made mention of this point, and said while it was a very interesting question it was not necessary to decide it.

In the Cohen case, as we will show, this Court held flatly against this claim on the part of the petitioner, and clearly sustained the Circuit Court of Appeals on this point. In order to fully realize how thoroughly this court held against the plaintiff in error on this point, it will be necessary to examine the pleadings in both cases in connection with the opinion in each case.

The following are the allegations in the Hill and Cohen cases, as they appeared in the records in these cases in this Court:

ALLEGATIONS AS TO MR. COHEN, INSURED, COHEN CASE:

And the said Alexander Cohen, on the 11th day of June, 1892, pal done-half of the annual premium due on said policy for the year beginning on the 11th day of June, all premiums due before that time having been paid, and thereafter wholly neglected, failed and refused to pay any other or further annual premiums ,or any part thereof, upon said policy, and that no payment whatever was made by or on behalf of said Alexander Cohen of any annual or semi-annual premium due upon the said policy, but the same was by him suffered to lapse and become forfeited.

See record former hearing, Cohen case.

ALLEGATIONS AS TO MR. HILL, INSURED. HILL CASE:

And the said Hill, being fully so informed and advised in the premises, refused to make payment of said premium, or any part thereof, and then and there intending and for the purpose of inducing said defendant to rely upon the same, informed the defendant that he, the said George Dana Hill, was unable to pay said premium, and did not intend to make payment thereof, or of any premium thereafter to accrue upon said policy of insurance; but, on the contrary, he, the said George Dana Hill, intended to allow said policy to lapse and become forfeited.

See record former hearing, Hill case.

ALLEGATIONS AS TO BENEFICIARIES, HILL CASE, DEFENDANTS IN ERROR:

And the said Ellen Kellogg

ALLEGATIONS AS TO MRS. COHEN, BENEFICIARY. COHEN CASE:

NONE.

See record former hearing, Cohen case.

Hill, his wife, during her lifetime, and each and all of the plaintiffs neglected and refused to pay the defendant the said sum, or any part thereof.

See record former hearing, Hill case.

1. This Court in the Hill case, decided six months before the decision in the Cohen case, held that the pleadings in reference to the refusal of the bneficiaries to pay the premium implied a personal demand upon them and made a good defense if proven, and that it was not necessary to decide whether the agreements, statements and declarations of Mr. Hill, the insured, would be binding on the beneficiary.

2. When this Court come to consider the Cohen case, it found no allegations of refusal on the part of Mrs. Cohen, the beneficiary; yet the allegations of the answer in reference to Mr. Cohen, the insured, were full stronger than those made against the Hill beneficiaries.

3. So if the declarations, statements and conduct of Mr. Cohen were binding on the beneficiary, Mrs. Cohen then the answer in the Cohen case was good and sufficient regardless of the question of the place of contract. But the Court found and held that the declarations of Mr. Cohen, the insured, were not binding on the beneficiary and did not establish a good defense as to the beneficiary.

This Court in the statement of the case, 179 U. S., 262, says:

"On November 9, 1898, this action was commenced in the Circuit Court of the United States for the District of Washington. The ingle defense was the non-payment of premiums after June 11, 1892. *There was no suggestion of rescission, abandonment, knowledge by the beneficiary*

of the non-payment of the premium, or any refusal or failure ON HER PART in respect to the policy."

In the opinion further on the Court says:

"The Mutual Life Insurance Company vs. Phinney, 178 U. S.,327, was an action against the same Insurance Company in the same district on a policy like the one in controversy here SAVE THAT IN THAT THE INSURED WAS HIMSELF THE BENEFICIARY."

It will be observed that the Court says that there was no suggestion of rescission, abandonment, knowledge by the *beneficiary,* no refusal on *her* part; but the Court will observe and we desire to repeat that the same answer had alleged that Mr. Cohen the insured, had wholly neglected, failed and refused to pay the premium; so if the statements and conduct and abandonment declared on the part of the insured, Mr. Cohen, were binding on the beneficiary, Mrs. Cohen, the plaintiff in error had plead a good defense and it would not have been necessary to consider any other point by the Supreme Court. But the Court says, there was no allegation against the beneficiary; no allegation as to her. Continuing the Court says in its opinion:

"The primary question noticed but not decided in those cases (the Phinney case) is distinctly and solely presented in this."

As we have said before, this means not that the primary question is the only one raised but the only one that made out a good defense for the Insurance Company. Every question now raised and urged so strenuously was likewise raised and urged strenuously in the Cohen case. Every question now raised was properly raised on the record in that case. The Court means by this language

that that primary question was the only question that could avail the Insurance Company. It means that and it cannot mean anything else. This will clearly appear by an examination of the brief in the Cohen case. Here is a synopsis of the points raised in the Cohen brief together with a citation to the particular part of the brief where discussed.

1. "The contract was abandoned by Cohen, and this he had a right to do." Cohen brief, page 89.

2. "The premium notice of New York never had any application to the Cohen policy. This statute did not apply to the business of collecting premiums outside of New York." Cohen brief, p. 12.

3. "The statute of 1877 applied to the business of collecting premiums within New York." Cohen brief, p. 13.

4. "The limitation of the scope of the acts of 1876 and 1877 and 1892 is consonant with the policy of the legislature manifested by the act of 1897." Cohen brief, p. 25.

5. "The Cohen policy is a Montana contract under the true doctrine of the conflict laws." Cohen brief, p. 28.

6. "It is submitted that equitable and true construction of the statute of New York is that the statute operated on the first default alone and did not preserve the contract forever under successive defaults." Cohen brief, p. 30.

7. "No notice was necessary because Cohen's post-office address was not in the state of New York." Cohen brief, p. 84.

8. "If the Court holds the true construction of the statutes of 1877 and 1892 required a notice to be sent Cohen unless waived, then it is claimed by the plaintiff in error that the sending of any statutory notice was waived by Cohen by the express terms of the policy." Cohen brief, p. 80.

9. "The alleged cause of action was not pleaded and

there was a departure. For argument on this point see Phinney brief point 7." Cohen brief, p. 89.

In fact the Insurance Company in their Phinney brief, which was filed in that case when before this Court, at page 143, admits that the declarations and statements of the insured are not binding upon the beneficiary.

"This might not apply to cases where one has insured his life for another's benefit, for, as was said in Griffith vs. Life Ins. Co., (101 Cal., at page 638), 'the doctrine is well settled that where a valid policy is regularly delivered in pursuance of a consummated contract to one who has procured insurance upon his own life, *payable to another*, the insured cannot surrender the policy without the consent of the beneficiary.' But if the beneficiary is the insured himself, as in the present case, his right to surrender does not depend on the consent of any one else."

The following are quotations from some of the decisions of the various Courts and text works on this point.

"It is not quite true that a failure of the wife to pay the premiums from year to year as they became due will work this result. The statute, unless waived in writing (the Court should have said in writing, *in red ink*, on the face of the policy; see chapter 347, Laws of New York, 1897), provides that after the lapse of three years the reserve value of the policy, computed according to certain principles, is to be taken as a single premium of life insurance, at the published rates of the company, at the time the policy was issued, and must be applied either to continue the insurance of the policy in force at its full amount so long as such single premium will purchase temporary insurance of that amount at the age of the insured at the time of lapse, or to the purchase upon the same life, at the same age, paid-up insurance payable at the same time, and under the same conditions, except as to the payment of premiums, as the original policy (chapter 347, Laws 1879). *And no policy can be declared or treated as lapsed or forfeited until* 30 *days after notice* to the policy holder."

Stokes vs. Ammerman, 121 N. Y., 323.

"The party insured is not a party to the record, and therefore the declarations are not admissible on that ground. She is not a party in interest, as the whole benefit and interest inured to the assured. *She is not an agent and authorized to speak for him. Nor does she come within any other rule by which her declarations can be received against him.*"

Ins. Co. vs. Haney, 10 Kansas, 403, by Judge Brewer.

"In this case the insured reserved to himself no power of revocation or of changing the beneficiary. It is true that he entered into no obligation to continue to pay the premiums; but the omission to do this did not have the effect to give him an implied power of revocation. His mother herself might continue the payment of the premium. Moreover, by the terms of the policy, after payment of two annual premiums it would not lapse, and valuable rights would still exist under it. Under the circumstances the insured could not legally surrender the policy without his mother's consent, and her rights are not affected by such surrender. This seems to us to be the true rule, and it is supported by the weight of authority."

Pingry vs. Insurance Company, 144 Mass., 381.

"Assuming that by the policy John Lindemann was trustee for the children, it is insisted that the trust was revocable at the option of the trustee and was so far executory as to be capable of revocation; but I think it is a mistake to assume that the trust was wholly executory. It had been to a large extent executed. Every payment of premiums for 15 years had steadily added to the value of the policy as the property of the beneficiaries. The day of final payment grew nearer and the burden of premiums decreased steadily in number. Each payment made added to the surrender value and fully executed the gift to the extent of that value. What the insured had done for the benefit of the assured he could not undo with-

out their consent, nor take from them what was already theirs and destroy the trust so far as executed."

Garner vs. Germania Life Ins. Co., 110 N. Y., 266; 18 N. E., 131, 132.

"The insured in such a case is not a party to the record, has no interest in the policy, *and, if he is to be considered as the agent of the beneficiary in procuring it, his agency ceases* with its issuance, so that there is no legal ground upon which his statements can be received."

Grangers' Ins. Co. vs. Brown, 57 Miss., 308, 315.

"The offer of the defendants to prove the statements of Fish, made in the fall of 1853, in relation to his intemperate habits, was properly overruled. Fish was not, after the issuing to the plaintiff of the policy in suit, a party in interest in that contract, and could make no statement or admission that would divest the rights of the plaintiff. He was not in any manner the agent of the plaintiff, after the issuing of the policy, and so could not bind him."

Rawls vs. Ins. Co., 27 N. Y., 282, 290.

"The statements in question, then, are the declarations of a stranger, one who is neither a party to the suit, nor was, at the time of making them, acting as the agent of a party. * * * They were not admissions against interest, for they could injuriously affect only his wife's separate property."

Fraternal M. L. I. Co. vs. Applegate, 7 Ohio St., 293, 279, 298.

"To the same effect is Mr. May's text on the same question:

'A life policy and the money to become due under it belong the moment it is issued to the beneficiary named in it, and the person procuring the insurance has no power by deed, assignment or will to surrender the policy and

issue a new one, or by other act to transfer the interest to anyone else. This right cannot be affected by any acts of the assured subsequent to the issue of the policy, except it be a breach of the condition. * * * No admissions of the assured subsequent to the policy are admissible against the beneficiary.'

May on Insurance, 3d ed., 399, L.

"'While the beneficiary lives, no surrender of the policy without his consent, or non-payment of the premium after such surrender, will defeat his right. A surrender of the policy by the husband for the wife is ineffecutal without her authority. * * * and although the policy may be forfeited for non-payment of premiums, yet non-payment of premiums after such an attempted wrongful surrender, without notice to the beneficiaries, will not forfeit the policy."

May on Insurance, 3d ed., Sec. 399, P.

"And it is a general rule that a policy and the money that may become due under it belong the moment it is issued to the beneficiary named in it, and the person procuring the insurance has no power by deed, assignment or will to surrender the policy and issue a new one, or by other act to transfer to any other person the interest of the person named.

Wash. Bank vs. Hume, 128 U. S., 195, p. 207.
Glanz vs. Gloeckler, 104 Ill., 573.
Gould vs. Emerson, 99 Mass., 155.
Wilburn vs. Wilburn, 83 Ind., 55.
Ricker vs. Ins. Co., 27 Minn., 193.
Ins. Co. vs. Smith, 44 Ohio St., 146.
Garner vs. Ins. Co., 110 N. Y., 266.
Pitcher vs. Ins. Co., 33 La., 322.
Bacon on Ins., Sec. 292.
May on Ins., Sec. 399, p. ..
Ins. Co. vs. Wilke, 47 S. W., 544.

V.

WHERE PARTIES TO A CONTRACT MAKE

THE PLACE OF CONTRACT IN A STATE DIFFERENT FROM THAT OF THE PLACE WHERE THE CONTRACT IS DELIVERED, THEY CANNOT BY INSERTING AN AGREEMENT IN THE CONTRACT WAIVE A PUBLIC POLICY STATUTE OF SUCH STATE.

It seems entirely unnecessary to discuss this question for the reason that every Court so far as we know when called upon to pass upon this question have held that such statute could not be waived. But what is more important still, is the fact that since the former hearing of this case, the New York Supreme Court has decided this question in our favor. In that case the insured had given his note in payment of a premium subsequent to the due date of it. The note contained a condition that the policy should be forfeited "without notice to any party or parties unless paid when due." The note was not paid when due and the Company insisted upon a forfeiture. The Court held that this attempted waiver of the service of a notice required by the statute was of no effect or force, stating: "The statute limits the operation of such agreement of forfeiture so that they can only take effect after the prescribed notice of forfeiture, it is prohibitory and cannot be evaded."

Strauss vs. Insurance Co., 67 N. Y. S., p. 509.

The opinion in the above case was affirmed in 70 N. Y. S., 1149, the Court saying: "Judgment affirmed with costs on the opinion of Justice Gaynor, 67 N. Y. S., 509. This case has been again affirmed in the recent decision by the New York Court of Appeals, 63 N. E., 347, the Court saying: "The only default on the part of the plaintiff

was a failure to pay a part of the premium on the due day and as the defendant had never served a statutory notice it was not in a position to work a forfeiture of the policy."

The court will observe that the extension of time in the payment of premium in the above case was made by an agreement in the note, that the policy should be forfeited if the note was not paid when due without any notice to any of the parties in interest. If such a waiver after the premium becomes due is not effectual, then it follows as clear as day that a waiver inserted in a policy at the time of the delivery and before it took effect would be of no effect or force.

It seems to us that petitioner can hardly fairly contend that this Court did not at least negatively hold against it on the former hearing on this point.

The defense that the statute of New York was waived by the express terms of the policy, was the only defense common to the whole cluster of cases argued at the same time, as the Hill case, to-wit, the Phinney case, the Hill case, the Sears case, the Cohen case and the Allen case. A decision on this point in favor of the Company, would have forever ended all those cases. Nothing would have been left in any of them for a new trial, nor would one ever have occurred. It was the only point common to them all, which was fatal to them all. As the Court left them, all were sent back to the Lower Court with the possibility of a new trial. If this point was well taken, the Court would not only have eneded the matter by deciding it in accordance with the prayer of the plaintiff in error, but would have avoided the burden to itself of going into the cases at great length, writing several opinions on dif-

ferent points, and deciding several important and difficult questions. It certainly would not have traveled this long and difficult route when it could have taken a short, sure and certain one that would have ended all the cases and all the trouble, both to the Lower Courts, this Court, and the litigants as well. If it did not decide this point affirmatively in favor of the plaintiff in error; yet, at least in a negative way, it did decide the point against it. The most that can possibly be claimed by the petitioner is that the Court left the decision of the Lower Court undisturbed, but we claim that it clearly appears by the decision in the Hill case and the Cohen case taken together that this Court decided this point in favor of the respondent, and against petitioner. The Cohen policy contained a clause identical with this, attempting to waive the statute of New York. The Court in the statement of the case by Justice Brewer, sets out in full this clause, which the plaintiff in error claims had this effect. (See statement of case 179 U. S., 262.)

We have before quoted a portion of the opinion that we now quote, but for the convenience of the Court set it out here.

"The primary question noticed but not decided in those cases, is clearly and solely presented in this."

"New York, on the other hand, the state by which the Insurance Company was chartered and in which it had its principal office, by Section 1 of Chapter 321 of 1877 had enacted——"

"The provision referred to, which is stated at length in the succeeding part of the section, is one for notice of a special kind and to be given in a particular way. The section is quoted in full in 178 U. S., 330, 44 L. Ed., 1089.

"This notice was not given. Hence, if the law of New York controls, the policy was still in force and the plaintiff was entitled to recover. The question, therefore, is whether the law of New York controls."

It surely means what it says, that if the policy was a New York contract the waiver clause was of no force of effect. It could not have decided the point more effectually against the contention of plaintiff in error if it had said: "The clause in the policy attempting to waive the statutory notice is of no effect if the policy is a New Yerk contract."

We have called the Court's attention to the fact that in the Cohen case this Court said: "The primary question noticed but not decided in this case (Phinney case) is distinctly and solely presented in this," did not mean that that was the only question raised in the case because this point we are now discussing was urged at length in the Cohen and Phinney briefs filed by plaintiff in error, devoting 28 pages in those briefs to this point alone. See Cohen brief, page 88, Phinney brief, page 116.

Each of the Courts from which the following cases are extracts fully support this ruling, as will more fully appear by an examination of the cases at length. But without discussing each case separately, we make the following quotations from them:

"The contract of insurance having been made with reference to the laws of the State of Ohio, the plaintiff had the right to rely upon them in enforcing his contract so far as they related to its validity, nature, interpretation and effect. Bank vs. Ruxkman, 16 Grat., 126, 127; Corbin vs. Bank, 97 Va., 665, 13 S. E., 98; 2 Minor Ins., 145; Story, Confi. Laws, 263, 280. * * * It is therefore as much a part of every contract of life insurance

governed by the laws of the State of Ohio, and made after that statute was passed, as if incorporated in it; the general rule being that laws in existence are necessarily referred to in all contracts made under such laws, and that no waiver of the particular stipulation in the contract can change the law. Hermany vs. Association, 151 Pa. St., 17; 24 Atl., 1064; Ins Assn. vs. Ficklin, 74 Md., 172, 21 Atl. 680, and 23 Atl. 197; Ins. Co. vs. Leslie, 47 Ohio St., 409; 24 N. E., 1072; and White vs. Society, 163 Mass., 108; 39 N. E., 771."

Ins. Co. vs. Pollard, 26 S. E., 421.

The insurance in the above case was effected in the state of Virginia. Between the Insurance Company's agent there, and the insured, who resided there. In the following case the party resided in Texas, where the contract was actually completed.

"We come, then, and consider the terms of the statute just as if they were literally printed in the policies as we are required to consider and construe any other written contract, except as it was proved by the statute law of New York. Its provisions are mandatory and cannot be waived by the contracting parties."

Ins. Co. vs. Orlopp, 61 S. W., 336.

"The Pennsylvania statute enacted that whenever the application for a policy of life insurance contains a clause of warranty of the truth of the answers therein contained, no misrepresentation or untrue statement in such application, made in good faith by the applicant, shall effect a forfeiture. * * * In other words, the statute is to be entirely overthrown and set aside, and the Insurance Company, under the guise of an agreement, is to acquire the power to accomplish the very result which the statute intended to prevent. Statutes would be very ineffective if they could be defeated in this way. * * * Neither can an agreement be valid which gives an effect to a warranty which is in defiance of the statute. The Legislature enacted a rule for the regulation of the

contracts of Insurance Companies, which is a matter of public interest and concern. The operation of the rule does not depend on the agreement of these corporations to adopt it as a basis of their contracts, on the contrary, the rule prescribes the scope and effect of policies of insurance, and authoritatively determines the duties and obligations which arise from the contract. * * * The contract of insurance must be made in subordination of the statute, and must have the legal effect which the statute attributes to it, and none other."

Insurance Co. vs. Ficklin, 74 Md., 172.

"Admit that Griffith attempted to waive all notice of non-payment of premiums, if the power was lacking in the corporation to declare a forfeiture in consequence thereof, it is not perceived how it can be done. The very idea of a waiver involves the right of the contracting parties to make and accept such waiver—consent never gives jurisdiction not otherwise possessed of the subject matter to a Court, for the reason that it lacks the power to adjudicate such subject matter, except as conferred by law."

Mr. Griffith was a resident of California, where the contract was finally consumated.

Griffithvs. Ins. Co., 101 Cal., 627.

"It follows that the insertion in the policy of a provision for a different rule of computation from that prescribed by the statute in case of a default in the payment of a premium after three premiums have been paid, as well as the insertion in theapplication of a clause by which the beneficiary purports to 'waive and relinquish all right or claim to any other surrender value than that so provided, whether required by a statute of any state or not,' is an ineffectual attempt to evade and nullify the clear words of the statute."

Clement vs. Ins. Co., 140 U. S., 226.

"The notice sent to the insured, in the present case, did not comply with this statutory provision. The de-

sign of the statute is apparent. A policy in a regular life company fixes both the time of payment of premium and the amount thereof; yet the same statute provides that no life insurance company can declare forfeiture or lapse any policy by reason of the non-payment of any premium without notice, and prescribes what such notice must contain. It further provides that in case the payment is made within the life of the notice it shall be taken to be in full compliance with the requirements of the policy, anything therein contained to the contrary notwithstanding. These statutory provisions form a part of the contract of insurance and cannot be waived by the parties."

Warner vs. Association, 100 Mich., 158.

"Though a policy of life insurance was issued by a New York company to a citizen of Texas, containing a provision to the effect that if any of the premiums were not paid when due the policy would become void, and that notice that each premium would be due at the date named in the policy was given by the policy, and that any other notice required by any statute was thereby expressly waived, the statute of New York enacted in 1877 (requiring notice to be mailed to the assured at least thirty days before the premium was due, in order to cause a forfeiture), applied, and a notice sent 15 days before the premium was due was insufficient."

Ins. Co. vs. Smith, 41 S. W., 680.

In this case Mr. Smith resided in Texas, where the insurance was effected and the contract finally consumated.

The foregoing authorities are directly in line with the general rule, as stated by Mr. Wharton on Conflict of Laws:

"To this statement, however, it may be objected that in cases where the law of the place of making the contract conflicts with the law of the place of performance, the validity of the contract, so far as concerns its perform-

ance, depends upon the law, not of the former, but the latter, place. It has hence been frequently held that a contract illegal by the law of the place of performance is illegal everywhere. On the other hand, an action may be maintained on a debt good where it is payable, though invalid by the local laws of the place where the contract is made. But the conflict of opinion in this respect is rather nominal than real."

The Court of Appeals of New York stated the proposition in these words:

"A contract which is illegal and void, either by the law of the place where it is made, or that of the place where it is performed, is illegal and void everywhere. Hyde vs. Goodnow, 3 N. Y., 266-269."

See Jewell vs. Wright, 30 N. Y., 259.

This decision, together with the decision in the case of Jewell vs. Wright, 30 N. Y., 259, supra, having been announced prior to the execution of this contract, was as much a part of the contract as the statute. The company knew that such would be the construction of the contract by the Courts of that state whenever it undertook to enforce the forfeiture provision of the policy in New York, where it alone could exact a forfeiture.

The Supreme Court of Missouri on the same question used this language:

"A contract for a loan made payable in a foreign country may stipulate for interest higher than allowed at home, and if the contract is illegal there it will be illegal everywhere."

Bank of Louisville vs. Young, 37 Mo., 398.

In a case decided in the Supreme Court of Massachusetts, Justice Carey uses this language:

"The notes in suit having been made payable in Louisiana, the question of the validity depends upon the law of that state. If they are void by that law, they are void everywhere."

Stevenson vs. Payne, 109 Mass., 378.

Mr. Storey in his "Conflict of Law" (Redfield's edition), section 242, uses this language:

"Generally speaking, the validity of a contract is to be decided by the law of the place where it is made, unless it is to be performed in anothr country, for, as we shall presently see, in the latter case the law of the place is to govern. If valid there, it is by the general law of nations, *jure gentium*, held valid everywhere."

Section 253: The same rule applies vice versa to the validity of contracts; if void or illegal by the law of the place of contract they are generally void and illegal everywhere."

VI.

TEH POINT THAT THE STATUTE OF NEW YORK APPLIES ONLY TO ONE DEFAULT AND NOT TO SUCCESSIVE DEFAULTS, ON THE GROUND THAT THE COMPANY IS A MUTUAL IT MUST BE DECIDED AGAINST PETITIONER BY THIS COURT IN THE COHEN CASE. IN FACT, IT MUST B EDECIDED AGAINST PETITIONER ON REASON.

It is true that in the decision in the Phinney case the Court used this language, "but it is a very different question whether the executors of the insured, after his long delinquency in the payment of premiums, can enforce the contract as against the other insured parties, threby di-

minishing their interest in their accumulated reserve." That point was before the Court in the Cohen case.

See Cohen brief, p. 30.
See Phinney brief, p. 94.

But the Court disposed of this point in the Cohen case as it did of the other points, saying:

"The primray question in those cases is distinctly and solely presented in this. This notice (the statutory notice) was not given. Hence, if the law of New York controls, the policy was still in force and the plaintiff was entitled to recover. The question is, therefore, whether the law of New York controls."

We think this effectually ends the contention of plaintiff in error. This must be the law on principle. The statute says no policy hereafter issued or renewed by any life insurance company shall be declared lapsed or void for failure to pay any premium unless the company shall serve a prescribed notice. No one will contend that the legislature of New York had not the power to make the forfeiture of any policy conditioned solely on the service of such notice and provide that the policy should be a continuing one until such notice was served. Surely the legislature of Washington has that power over local and foreign insurance companies if it considered it a wise policy to enact such a law. Yet, if the contention of plaintiff in error is correct, such an act will be unconstitutional and void as against a mutual insurance company. We think a Court would hesitate a long time before declaring such an act unconstitutional. Yet, if such an act is not unconstitutional, the argument of plaintiff in error is not well taken.

Every member of a mutual life insurance company

when he becomes a policy holder enters into an agreement and understanding, if not actual, at least implied, that the corporation itself will make other contracts with other people along the same general line. He consents and agrees in law that the corporation, acting by its officers, shall make valid and existing contracts with such anticipated policy holders. He trusts to the officers of the corporation to make valid and profitable contracts. Such policy holder gets the benefit of contracts thus made. While getting the benefit of contracts so made, he must stand his share of the burden of such contracts. He must share in the losses incident to the business as well as share in the profits. As a policy holder he has a right to insist upon the company enforcing the provisions of a contract in favor of the corporation. As a policy holder he has no right unless the contract be *ultra vires* to ask a Court to ignore the provisions of a new contract favorable to the new policy holder. As a member of the corporation he can ask nothing further than that the corporation live up to the contracts it makes with other policy holders, and demand of each policy holder that they life up to the provisions of the contract. No one will contend that a legislature that grants to a corporation of this kind a charter enabling it to write life insurance might not insert in such charter a provision to the effect that no policy could be forfeited until it served a prescribed notice in a prescribed way. In such case each policy holder contracts with the corporation with the understanding that his policy and any other policy it might write would be subject to the provisions of the charter and would not be forfeitable except by the officers of the corporation, complying with such provision. Every party who contracts with a

corporation of this kind does it with the knowledge and understanding that a legislature may interpose upon such a life insurance corporation, as a condition of forfeiture, the service of such a notice, and that if the legislature chooses to enact such a law no contract will be forfeitable unless notice is served.

No policy holder has a right to demand in such a case that the policy of another member of the association shall be forfeited on any other than the terms so required by such an act. Each policy holder has the protection of such legislation. Each policy holder may claim it and rely upon it, and no policy holder has the right to ask of another policy holder not to ask the protection that such policy holder himself might demand and claim. Take the structly mutual benefit associations, for example, where the trustees or officers are compelled to make assessments to pay death losses. So far as I am aware, in every instance, by the laws or by the nature of the organization, a notice is required to be served on each member. It has never been claimed, so far as I am aware, that a membr loss his policy unless he has first been served with a notice stating the amount of the assessment. No member of such an association has a right to ask that a policy of a member cease until the requisite notice is served, and if the officers of the association fail and neglect to perform their duties, then the association itself must suffer the loss, because the agreement is mutual and based on the agreement and understanding that no one shall lose his membership or his insurance except on the condition of the service of the prescribed notice.

I have never known of a policy holder who was wor-

ried for fear that an insurance company which had issued to him a policy would not forfeit enough of the contracts of his brother policy holders. The suggestion that there might be such a one is something new and novel. I have never heard anyone suggest that a company did not insert in its policy a sufficient number of harsh forfeiture provisions and did not enforce them with sufficient promptness.

The notice law of New York is not harsh nor unusual. Similar laws have been enacted in a number of states to protect the policy holders. Nearly all of the Courts that have been called upon to pass upon such laws have spoken of them with favor. The notice law of New York does not prevent the company from forfeiting a contract on the day stipulated for the premiums to be paid, but provides easy and simple methods of terminating insurance contracts unless the premiums are paid. It is not at all similar to the Stratham case, where each party was prevented from living up to the terms of the contract by war. In that case no question of notice was involved, but I feel certain that if the life insurance company interested in that case had been required to serve a notice of forfeiture as a condition of forfeiture of the contract, and then, the war intervening, not being able to serve their notice, they would have been compelled to suffer instead of the policy holders, but the contract in those cases required the insured to pay the premiums on the day served, and if not paid on that day the policy was to be forfeited. The Court held that, while it was true they could not pay, still the burden was upon them to pay, and the contract ceased. Again, in this case the corporation is defending. No policy holder has intervened and asked to be protected in this

case, but the issue is here between the corporation itself and the plaintiff. The corporation is defending as any other corporation would defend. The policy holders themselves are making no defense nor asking to intervene in their own behalf.

VII.

THE CONTENTION THAT RECOVERY IN THIS CASE IS IN THE NATURE OF A SPECIFIC PERFORMANCE BY THE PARTIES WHO HAVE FAILED TO MEET THE OBLIGATION OF THE CONTRACT, HAS BEEN DECIDED ADVERSELY TO PETITIONER BY EVERY COURT WHICH HAS PASSED UPON THAT QUESTION.

The same contention was made when the case was here before. The point being a common one in all the cases before the Court on the former hearing, a decision in favor of petitioner on this point alone would have ended all the cases. It is not referred to nor mentioned in any o fthe decisions of that cluster of cases heretofore mentioned. It has been decided adversely to petitioner in a dozen decisions in the different state Supreme Courts. The Appellate Court of New York was the first Court to pass upon this question. The pleadings here are identical with the pleadings in that case. That Court said:

"It was not necessary, in order to enable the plaintiff to recover the sum insured, to pay or tender before action the premium that was payable on the 24th day of August prior to the death of insured. If the policy was in full force when the assured died, as we think it was, that event fixed the liability and obligation of the defendant, notwithstanding the omission to make that payment. Nothing remained to be done by the widow of the insured, or her as-

signee, except to present to the defendant the proofs of death required by the policy. The death of the assured terminated the contract. The defendant's promise to pay, if it was not discharged, had matured, and the person entitled to the benefits of the policy had only to establish the facts of death within the time and in the manner prescribed therein. The contract was kept in life, by force of the statute, until the contingency upon which payment depended occurred. The death of the assured created the relation of debtor and creditor between the defendant and his widow, and the unpaid premium, with interest from the date when payable, was a claim to be deducted by the defendant from the sum due upon the policy. This put the defendant in precisely the same position in which it would have been if the premium had been duly paid. Carter vs. John Hancock M. Life Ins. Co., *supra*. It was conceded upon the argument in this case that the unpaid premium, and interest thereon, was deducted from the verdict, and thus no injustice has been done."

Baxter vs. Ins. Co., 119 N. Y., 450.

In a still later case this decision was upheld by the same Court, in which all the justices concurred. The following quotation states the necessary facts:

"There is no question of pleading involved. The plaintiff was not bound to allege or prove the payment of the annual premiums when due. The contract is to be read as if the act of 1876 had been literally incorporated into it. There could be no forfeiture for this cause unless the defendant alleged and provd non-payment after the due service of the notice required by law. * * * As the defendant was never in a position where it could insist upon a forfeiture, it becomes unnecessary to consider the question of the sufficiency of the notice served."

De Frace vs. Insurance Co., 136 N. Y., 144, p. 151.
Osborne vs. Ins. Co., 123 Cal., 610.
Ins. Co. vs. Hill, 97 Fed., 263.

It seems to respondents upon authority that its con-

tentions are correct, that no good result could possibly be served by the Court granting this petition for a writ of certiorari. This case has been in litigation for the past eight years. We think we have shown that every question that is raised by the petitioner has been decided by this Court and the lower Court and by many other State Supreme Courts in our favor. The litigation has been a most expensive one to the respondents. Their means have been nearly exhausted in prosecuting this case. If the writ is granted there will necessarily follow an affirmance of the lower Court.

Wherefore, plaintiff prays that this petition for a writ of certiorari be denied.

Respectfully submitted,

STANTON WARBURTON,

Attorney for Respondents.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 166.

THE MUTUAL LIFE INSURANCE COMPANY, *Petitioner*,

vs.

ELIZA MAUDE HILL, GEORGE E. HILL, ELLEN KELLOGG HILL, AND EUGENE C. HILL, BY HIS GUARDIAN, EBEN SMITH, *Respondents.*

BRIEF OF RESPONDENTS.

STATEMENT.

This action is based on a policy of insurance on the life of George Dana Hill in favor of his wife, Ellen Kellogg Hill, if living, and in case of her prior death, then to the children of their bodies. The policy was issued on the 29th day of April, 1886, upon which one annual premium was paid shortly after the delivery of the policy.

On the 14th day of February, 1887, Mrs. Hill died, leaving surviving her, as children of their bodies, Eliza Maude, George E., Ellen Kellogg, and Eugene C. Hill. It will be noticed that Mrs. Hill died in less than one year after the policy was issued and before any subsequent premium was or could become due. Shortly after she died Eben Smith was appointed guardian of these respondents. George Hill,

the insured, died on the 4th day of December, 1890. Shortly after he died, notice and proofs of death were submitted to the company. The company denied liability on the sole ground that the policy was forfeited by non-payment of a premium on April 29, 1887. On the due date of the second premium, as mentioned in the policy (the day on which the company had right to demand premium by service of notice), the whole interest in the policy had become vested in the children. At that time all were minors, and were so at the time of the death of George Dana Hill, the insured. The policy provided that it was to be wholly performed in New York. The application also provided that "it was subject to the charter of the company and the laws of New York." It also provided that it was "agreed that the contract when made should be held and construed at all times and places to have been made in New York." At the time the policy was issued there was in force in New York a statute requiring the service of a prescribed notice as a condition precedent to an insurance company claiming or declaring a forfeiture of a policy of insurance. See Laws of 1876, amended 1877, chapter 321, in part as follows:

"No life insurance company doing business in the State of New York shall have power to declare forfeited or lapsed any policy hereafter issued or renewed by reason of non-payment of any annual payment of premium or interest, or any portion thereof, except as hereinafter provided."

It provided, further, for the service of the notice not less than thirty nor more than sixty days prior to the due date of the premium as mentioned in the policy, and "in case the payment demanded by such notice shall be made within thirty days limited therefor, the same shall be taken to be in full compliance with the requirements of the policy, in respect to the payment of said premium or interest, *anything therein contained to the contrary notwithstanding.*"

It has been held over and over again, in New York and other States, that an insurance company could not defend on the ground of forfeiture for non-payment of premium until it had first shown that it had sent the statutory notice, and that the parties interested in the policy had not paid the premium within the thirty days specified. It was so held in the case of Baxter *vs.* Insurance Company, 119 N. Y., 450, and again in De Frace *vs.* Insurance Company, 136 N. Y., 145, 151, and in many other cases in New York and in other States.

The insurance company never claimed, and does not now claim, that it ever served or attempted to serve the statutory notice required by the law of New York mentioned, but defended on the ground, as stated by Justice Brewer of this court, in the former hearing of this case:

"It is alleged not only that the insured and the company agreed to abandon the contract, but also that the beneficiary, his wife, and the plaintiffs, their children, 'failed, neglected and refused' to pay the premium. So we have a case in which not only did the insured and the company abandon the contract but the beneficiaries neglected and refused to do that which was essential to keep the policy alive. The allegation in the answer does not disclose a mere omission, for it is 'neglected and refused,' and, of course, there can be no refusal unless with knowledge of the opportunity or duty. A party cannot be said to refuse to do a thing of which he knows nothing. Refusal implies demand, knowledge or notice. The case, therefore, is one in which the beneficiaries refused to continue the policy, while the insured and the company abandoned it."

At the first hearing the lower court held that the agreement alleged between the insured and the company was not binding upon the minor beneficiaries, and that the allegation of their refusal to pay the premium did not and could not excuse the company from serving the statutory notice as a condition precedent to their acquiring the right to for-

feit the contract. The lower court was affirmed by the circuit court of appeals.

Both courts were reversed by this court in the language above quoted.

The only question, we claim, left open by the mandate of this court was a submission of this question. When the case reached the lower court respondents denied each and all of the allegations above mentioned. Petitioner did not prove or offer to prove that respondents refused to pay the premium. It did not even attempt to prove that they had knowledge of the non-payment of the premium. It certainly was its duty under the opinion of the court to do so. It had the burden of proof. It was its duty to establish this affirmative defense. The petitioner not only failed to establish the defense that this court held good if proven, but made no attempt to do so. On the contrary, respondents did prove, *over the objection of petitioner*, they not only did not refuse to pay the premium, but did not know of the existence of the policy until after their father's death. (See Record, 81–8.) This brought them clearly within the decision of this court. In the language of the former opinion, "a party cannot be said to refuse to do a thing of which he knows nothing. Refusal implies demand, knowledge, or notice." Notwithstanding the fact there was no evidence to sustain the defense, but positive, uncontradicted evidence overthrowing it, the court nevertheless, giving the petitioner the benefit of every doubt, submitted the question to the jury in these words:

"One of the defenses set up in the defendant's answer is, that these plaintiffs neglected and refused to pay the premiums. A refusal on their part would constitute a complete bar of their right to recover in this case. If they have refused to pay the premium, then that amounts to a complete abrogation of the contract itself.

"Now a refusal implies an affirmative act with knowledge and with an opportunity to act. It is not synonymous with omission. A mere omission to pay the premium has

no such effect, but the defense that is interposed here is that these plaintiffs with knowledge that the premiums were due and were unpaid refused to pay them, and that is the question which I submit for you to decide, whether the evidence proves that there was any such affirmative act on the part of the plaintiffs in this case as would amount to a refusal to pay the premiums or whether there was any express contract or agreement since the delivery of the policy, which amounts to an agreement on their part to surrender the policy or abrogate the contract.

"There is another question which I submit to the jury, and that is whether Capt. Hill himself whose life was insured, abrogated this contract by any agreement on his part to surrender or avoid it. He was not the agent or trustee of the plaintiffs and his act would not be an equivalent to their act, but the contract was made by him; and his failure to pay the premium, if it was known to the plaintiffs and was acquiesced in by them and ratified by them, would be an abrogation of the contract. His act, not specially authorized or ratified, would not have that effect. If you find from the evidence that there was any affirmative act on the part of these plaintiffs or any act of their father that was approved and ratified by them, which abrogated this contract in any way, your verdict will be for the defendant."

Record, pp. 167–168.

As we have shown, there was absolutely no evidence to the effect that the beneficiaries knew of the non-payment of the premium. It does affirmatively appear that they did not know even of the existence of the policy, and of course were not aware of the non-payment of the premium. There was nothing to submit to the jury. The court should have peremptorily instructed the jury in favor of the respondents. There was nothing in the case upon which the court could submit the question to the jury of whether or not the beneficiary had knowledge of the non-payment of the premium. The only error the court committed was in submitting the matter to the jury at all. That was in favor of the petitioner and against the respondents; hence not prejudicial error.

The petitioner at the trial and in its requests for instructions admitted that the respondents had a vested interest in the policy and a contractual right to pay the premium. This being true, they had a right to pay the premium until the policy was forfeited. If the notice law of New York applies, there is no real pretense that it was *forfeited.* The chief defense is not forfeiture, but a claimed estoppel on the respondents from enforcing the contract. The language referred to is:

"Plaintiffs had the right, however, by virtue of their interest in the policy to have paid any premium at the time it fell due (we will show by decisions of New York no premium was due until notice was served), and the defendant would have been bound to accept it."

This court clearly held in the Cohen case that the neglect or refusal of the insured would not bind the beneficiary where she was not aware of the non-payment of the premium; hence the failure of Mr. Hill to pay is no defense in this case. This court in the Cohen case held that a provision in a contract of insurance like that in Baxter *vs.* Ins. Co., 119 N. Y., 450, that it was "a contract made and to be executed in New York and construed only according to its laws," would make the contract subject to the notice law of New York. This contract contains the agreement that:

"It is agreed that the contract when made shall be held and construed at all times and places to have been made in New York."

I.

Parties to a contract may by agreement subject their contract to the operation of the laws of the State or country of their choice, and the courts will give full force and effect to such an agreement. The parties to this contract by such an agreement made New York the place of contract.

The question where this contract was made was not an open one in the court below, neither is it here. The parties conclusively settled that question for all time by a clause in the contract. The very first thing they did, before either party was bound by the proposed contract, before the medical examiner had made an examination of the risk, or the officers of the company accepted the risk, at the suggestion of the company and as required by the company, they agreed, if the contract ever was made, if the contract ever was completed, and without regard to where it was completed, but "when made should be held and construed at all times and places to have been made in New York." Just preceding the paragraph from which the above is quoted is the following requirement of the company in the printed application it presented to Mr. Hill to sign: "The following agreement and declaration must be signed by the person in whose favor the policy is applied for and by the person whose life is proposed for insurance."

It is settled law that parties may fix the applicatory law by such an agreement. This rule was evidently understood by the insurance company when it prepared this contract. The language it employed is most emphatic. It wanted it so plain that "he who ran might read." It wanted it so plain that there could be no doubt about its interpretation and meaning. It took good care to forever foreclose any

controversy as to where the contract was made. It did not leave it to a recital in the policy "that it was made, executed, and delivered in New York." It evidently thought that might leave it open to evidence as to the place where it was actually made, but says that "*the contract when made shall* be held and construed at all times and places to have been made in New York." If this court gives effect to this agreement *it must hold*, in the language of it, that the contract was made in New York; it must construe this contract, as this clause requires that it should be construed, by the laws of New York. In the Cohen case Mr. Justice Brewer says:

"It is not doubted that a contract by an insurance company of New York executed elsewhere may by its terms incorporate the law of New York, and make its provisions controlling upon both the insured and the insurer. * * * While the contract is based upon the application, yet the latter is only a preliminary instrument, a proposal on the part of the insured, and a stipulation that it shall be controlled by the charter and the laws of the State is not tantamount to a stipulation that the policy issued thereon shall also in like manner be controlled. * * * But that (the clause in the Cohen application) is very different from a provision that the contract issued upon such application should also be in all respects controlled by the laws of New York. * * * The stipulation in this policy is different from that presented in the court of appeals of New York in Baxter *vs.* Brooklyn L. Ins. Co., 119 N. Y., 450, which was that it was a contract made and to be executed in the State of New York, and construed only according to the laws of that State. There was a direct provision in respect to the contract itself, and thus incorporated those laws into its terms. * * * Baxter *vs.* Ins. Co. contained in the contract as heretofore stated an express stipulation of the controlling law."

In this case it is "the contract when made (not the application) that shall be held and construed at all times and places to have been made in New York. This fully meets

the suggestion of the court and clearly distinguishes this from the clause in the Cohen policy, as in this case it is not the application but the contract when made shall be held to have been made in New York. In the language of the court it is the contract issued upon such application (not the application) that the parties agreed shall be deemed to have been made in New York."

The very first words of the application contained the identical language referred to in the extracts above quoted from the Cohen case, that the application was made "subject to the charter of the company and the laws of New York." So in this case the application is subject to the charter of the company and the laws of New York; but it is agreed that the contract when made should be held to have been made in New York and to be construed by the laws of New York. In addition to this, the company required performance wholly in New York.

The provision in this case, we think, is as strong and even stronger than the provision in the Baxter case, which, this court held, made the Baxter policy a New York contract, which was that "it was a contract made and to be executed in New York, and construed only according to the laws of New York." The last clause adds very little, if any, to the agreement. It would be just as strong if it simply used the language a "contract made and to be executed in New York," because, that being true, it would follow that the contract was governed by that law. In this case it is not only agreed that the contract was made in New York, but the policy provided that it was to be performed only in New York.

The words "contract when made," as used in the application, means a contract when signed, sealed, and delivered and everything done necessary to be done in order to make it a complete and binding contract on all parties.

Mr. Anderson in his law dictionary defines the word "make," of which "made" is past tense, as follows:

'To sign, seal and deliver; to execute: as, to make a deed, bill, note. The maker of a note is one who has executed and delivered the note."

When we speak of one who has made an assignment or contract, we mean one that has been executed and delivered. Mr. Abbott in his law dictionary defines "make" as follows:

"To make a contract is to agree, or if a written contract is contemplated to execute the paper with the requisite formalities and usually to deliver it as binding."

"'Make' spoken of in writing *inter partes* usually implies delivery; ordinarily the expression, made a note, imports that it was not only signed but delivered as an obligation. The instrument has no inception when the subscriber retains it for future disposal. 'An averment in a declaration or complaint of the making of a promissory note includes delivery to the payee. (Chapell *vs.* Bissell, 10 How., p. 274; 2 Cowen, 536). An averment that defendant made the note in suit is equivalent to saying that he signed it and delivered it to the payee (Sawyer *vs.* Warner, 15 Barb, 282). In the case of Wood *vs.* Owins, the U. S. Supreme Court has given a construction to the word "make" in reference to contracts. It holds that when a contract is signed, sealed and delivered, it is then made and not before. (Owins *vs.* Wood, 2 Cranst., 283, p. 258). To the same effect is Woodruff *vs.* Dorwin, 3 Vt., 82; 5 V. L., 500: also Gould on Pleading, 821: Chitty on Pleading, 257.'"

This makes it clear that the parties meant, when they used the words "It is agreed that the contract of insurance when made shall be held and construed at all times and places to have been made in the State of New York," a completed, a binding contract to have been made in New York.

Several courts have passed upon policies where they were actually issued and made in one State, but in which the policies or applications used the identical language of this contract or language identical in substance in order to make

the place of contract in some other or different State. These courts hold such language effectually establishes the place of contract. It will further be observed that in most of the case- the parties attempted to waive a statute in the State which was agreed upon as the place of contract. The court holds in each instance that a provision attempting to waive a public policy statute of a State of the agreed place of contract is void and of no effect. On the place of contract and the effect and validity of a clause waiving a statute of the agreed place of contract, we quote from them as follows:

"The policy of insurance provided that it was accepted upon the further conditions and agreements contained on the following page which are made a part of this contract *and which contract shall be held and construed to have been made in the city of Cincinnati, Ohio.* The contract of insurance having been made with reference to the laws of the State of Ohio, the plaintiff had a right to rely upon them in enforcing his contract so far as they related to its validity, nature, interpretation and effect (Bank *vs.* Rickman, 16 Grat., 126, 127; Corbin *vs.* Bank, 87 Va., 665, 13 S. E., 98; 3 Minor Inst., 145; Story, Conf. Laws, secs. 263, 280.)"

Union Central Life Insurance Company *vs.* Pollard, 26 S. E., 421.

"As we have said, it is argued that the policy in suit is a New York or Nebraska contract, and that there is no such law as that above set forth in either of these States. The policy was signed by the president and the secretary of the company, in the city of New York. The premium was made payable there and the amount of the policy was to be paid, in the event of the death of the assured, at the city of New York. *It was expressly agreed that the policy should be construed to have been made in the State of New York.* It was therefore a New York contract, and it is to be governed by the laws of that State (Richards. Ins., 44)."

Goodwin *vs.* Ins. Co. (Iowa), 66 N. W., 157, p. 160.

"There can be no doubt that this policy is to be construed according to the law of Pennsylvania. It is expressly provided in the application, which is made part of the policy,

that '*the place of contract shall be the city of Philadelphia, State of Pennsylvania.*' In Weyman *vs.* Southard, 10 Wheat., 1–48, Chief Justice Marshall stated it to be a principle of universal law that 'in every forum a contract is governed by the law with a view to which it is made.' (See Pritchard *vs.* Norton, 106 U. S., 124, 136; 1 Sup. Ct., 102, and cases there cited.) In this case no necessity exists for presumption from the circumstances, because the intention of the parties is expressed."

Penn. Mutual Ins. Co. *vs.* Savings Bank, 72 Fed., 413 on p. 418.

"It was also stipulated that the *said contract should be construed and governed by the laws of the State of New York.*"

The court held that under that provision the contract was dominated by the notice law of New York.

Johnson *vs.* Ins. Co., 78 N. W., 905.

"Looking to the policy in question we find inserted therein a condition, as follows:

* * * "'*This policy is a contract made and to be executed in the State of New York*, and shall be construed only according to the character of the company and the laws of that State.' From which it clearly appears that it was the intent of the parties to locate the place of its execution in the State of New York. Especially does this appear to have been the intention of the defendant. The provision above quoted appears as a part of the printed form of the policy issued by the company. It could have been inserted therein only after full consideration, and its insertion could have had but one object, and that was to bring the policy as fully within the terms of the State of New York as though it had been actually executed and delivered therein. This was done for the benefit of the company, and it must abide the results flowing therefrom. In our opinion sufficient appears upon the face of the policy to require us to construe it as though it had been actually executed and delivered in the State of New York. It must follow that the statute in question must be given force in determining rights founded thereon."

Griesemere *vs.* Ins. Co., 10 Wash., 202.

The supreme court of Georgia has recently supported this view of the case. The syllabus is written by the court and is as follows:

"Where, in a policy of insurance issued by an insurance company of the State of Massachusetts, it was stipulated as follows: 'No suit shall be brought under this contract, unless commenced within one year from the termination of the life of the member to whom it is issued, it being an express condition hereof that all rights of action hereunder are limited to said period of one year.' *It is further expressly agreed that the place of contract is the home office of the association, in the city of Boston, and this contract will be governed by, and construed, only according to, the laws of the State of Massachusetts* and where a law of the State of Massachusetts (Supp. Pub. St. Mass., 1882–88, p. 517, sec. 26), which was of force at the time the policy was issued, provided with reference to insurance companies of that State, as follows: 'No such company shall make any stipulation in its insurance contracts concerning the court or jurisdiction wherein any suit thereon may be brought, nor shall limit the time within which such suit may be commenced to less than two years after the cause of action accrues, and any such condition or stipulation shall be void,' *held, that the stipulation in the policy limiting the time within which suit may be commenced thereon to one year from the termination of the life of the member to whom it is issued is void*, and suit may be brought thereon at any time within the period allowed by the statute of limitation."

Mass. Ben. Life Ass'n *vs.* Hale, 23 S. E., 849.

In the case of Rosenplanter *vs.* Ins. Co., Judge Lurton, speaking for the court, said: "The contract in question is a New York contract, as it specifically provides that 'at all times and places it shall be construed to be a New York contract,'" notwithstanding the parties lived in Tennessee, where the contract was made.

Rosenplanter *vs.* Ins. Co., 96 Fed., 721.

"And it was stipulated in said policies that, if said annual premiums were not paid by or before said day, said policies should lapse and become void, and all payments made thereon should be forfeited to the company. *It was also*

stipulated that the said contracts or policies should be construed and governed by the laws of the State of New York. * * *

"There are but two questions involved in this appeal. The first is raised by appellant, and is whether, under the provisions of the New York statute above quoted, it was necessary to give the insured notice when the notes fell due, in order to entitle it to declare the contracts forfeited.

"In determining the question raised by appellant we are compelled to construe the New York statute quoted, and declare the meaning of the contract, reading the statute as a part of it. To do this involves only the well-known rule which requires the courts to declare the legal effect of a written instrument put in evidence, because such statute becomes a part of the written contract, and must be construed as such, with these differences, however: (1) *The requirements of such a statute cannot be waived by the parties;* and (2) the statute ought, perhaps, to receive the same construction by the courts of another State as is given to it by the courts of last resort, in the State where it was enacted. This rule is based, it is said, upon that section of our Federal Constitution which declares that 'full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State.'" * * * "We come, then, to consider the terms of the statute just as if they were literally printed in the policies, as we are required to consider and construe any other written contract, except, *as it was proved to be the statute law of New York, its provisions are mandatory and cannot be waived by the contracting parties.*"

New York Life Ins. Co. *vs.* Orlopp, 61 S. W., 337.

In the case of Washington Central Bank *vs.* Hume, 128 U. S., 195, this court passed upon a similar provision in a policy of insurance issued by a Connecticut company to a resident of the District of Columbia. It appears by statement of the case by Mr. Justice Fuller that the contract contained the following provision, that "the policy was issued and delivered at Hartford, in the State of Connecticut, and was to be in all respects construed and determined within the laws of that State." Speaking of this provision and the fact that the performance of the contract was to be in Connecticut, this court said:

"The rights and benefits given by the laws of Connecticut in this regard are as much a part of these contracts as if incorporated therein, not only because they are to be taken as if entered into there, but because there was the place of performance, and the stipulation of the parties was made with reference to the laws of that place.

"And if this be so as between Hume and the Connecticut companies, then he could not have, at any time, disposed of these policies without the consent of the beneficiary nor is there anything to the contrary in the statutes or general public policy of the District of Columbia."

To the same effect is a decision of the supreme court of Michigan:

"That no mistake might occur as to where the contract was to be regarded as having been executed and consummated the defendant company provided in its blank form for membership which was furnished to Mary Kelly and signed by her the following: '*It is further agreed that this contract shall be considered as having been entered into at Elkhart, Indiana, and shall be governed by and construed in accordance with the laws of said State.*' Yet in the face of this provision of the by-laws and this stipulation in the application for insurance, counsel for defendants contend that the contract is to be construed as a Michigan contract and not one made and consummated in Indiana. The court held the policy an Indiana contract."

Voorhees *vs.* Ins. Co., 91 Mich., 469; 51 N. W., 1109.

In the case of Griffith *vs.* New York Life Ins. Co., 101 Calif., D. 627, it will be noted that there was a provision in the application which was a part of the policy "that the place of contract was the State of New York," and "the policies were issued and all payments are to be made at New York in the State of New York, where defendant is organized."

The court held that these provisions subjected the policy to the laws of that State and required the service of the statutory notice before the policy could be forfeited.

To the same effect is Johnson *vs.* Ins. Co., 109 Iowa, 708. The court says:

"The defendant company was duly incorporated under the laws of the State of New York, and the policy was issued in that State, and by the terms of the application the contract was to be construed by the lawsthereof. It was therefore a New York contract."

If the parties did not intend this contract to be construed by the laws of New York, if they did not intend the court to declare that the contract was made in New York, what meaning did they intend the words that "the contract when made shall be held and construed at all times and places to have been made in New York" should have? Did they carefully prepare the language of this clause to make it clear the place of contract should be in the State of *Washington?* Was it a mistake when they used the words *New York* and intended *Washington?*

If they had used the word Washington instead of New York, would not the court be bound to hold with them that in truth and fact it was a Washington contract?

The attorney who prepared this contract used most apt language to designate New York as the proper law. They prepared it in the light of the repeated decisions of the most renowned courts that such language would be effectual in establishing the applicatory law. Having prepared the contract with care and skill, with the distinct and clearly expressed object in view of making the contract a New York one, it is no wonder that the company finds it difficult to show that just the opposite was intended.

At the one time the care and skill of the attorneys was employed to make it clear that the contract was to be governed by the laws of New York. Now they employ the attorneys to make as brave an effort as possible to show the language employed should have no such construction.

II.

New York is the place of performance of the contract. The presumption is that parties intended that the place of the performance of the contract shall be the place of contract.

The provision noted in the contract expressly stating that "the contract, when made, shall be held and construed at all times and places to have been made in New York," is not the only provision of the contract showing in the clearest manner possible that the parties intended to make the law of New York the applicatory law. In the absence of such a stipulation, courts invariably hold that the parties intend to make the place of contract that of the State or country in which they agree it shall be performed. It is presumed, as said in Hyde *vs.* Goodnow, 3 N. Y., 266, 269, that the parties look to the "law of the place of performance, in ascertaining the validity, obligation and effect of the contract." In this case the presumption arising that the parties intended New York to be the place of contract, by reason of making that the place of performance, is in entire accord with the express agreement of the parties to the contract. By an examination of the contract it will be observed that the policy was issued in New York upon the receipt of the application, and, as it recites in the policy, "in consideration of the application for this policy, which is hereby made a part of this contract." By the terms of the policy the proofs of death were to be delivered to the company at its home office, in the city of New York. The policy, when it matured, was payable to the beneficiaries in the State of New York. The policy provided that "the annual premium of $814.00 shall be paid in advance on the delivery of this policy and thereafter to the company at its home office in the city of New York on the 29th day of April in every

To the same effect is Johnson *vs.* Ins. Co., 109 Iowa, 708. The court says:

"The defendant company was duly incorporated under the laws of the State of New York, and the policy was issued in that State, and by the terms of the application the contract was to be construed by the lawsthereof. It was therefore a New York contract."

If the parties did not intend this contract to be construed by the laws of New York, if they did not intend the court to declare that the contract was made in New York, what meaning did they intend the words that "the contract when made shall be held and construed at all times and places to have been made in New York" should have? Did they carefully prepare the language of this clause to make it clear the place of contract should be in the State of *Washington?* Was it a mistake when they used the words *New York* and intended *Washington?*

If they had used the word Washington instead of New York, would not the court be bound to hold with them that in truth and fact it was a Washington contract?

The attorney who prepared this contract used most apt language to designate New York as the proper law. They prepared it in the light of the repeated decisions of the most renowned courts that such language would be effectual in establishing the applicatory law. Having prepared the contract with care and skill, with the distinct and clearly expressed object in view of making the contract a New York one, it is no wonder that the company finds it difficult to show that just the opposite was intended.

At the one time the care and skill of the attorneys was employed to make it clear that the contract was to be governed by the laws of New York. Now they employ the attorneys to make as brave an effort as possible to show the language employed should have no such construction.

II.

New York is the place of performance of the contract. The presumption is that parties intended that the place of the performance of the contract shall be the place of contract.

The provision noted in the contract expressly stating that "the contract, when made, shall be held and construed at all times and places to have been made in New York," is not the only provision of the contract showing in the clearest manner possible that the parties intended to make the law of New York the applicatory law. In the absence of such a stipulation, courts invariably hold that the parties intend to make the place of contract that of the State or country in which they agree it shall be performed. It is presumed, as said in Hyde *vs.* Goodnow, 3 N. Y., 266, 269, that the parties look to the "law of the place of performance, in ascertaining the validity, obligation and effect of the contract." In this case the presumption arising that the parties intended New York to be the place of contract, by reason of making that the place of performance, is in entire accord with the express agreement of the parties to the contract. By an examination of the contract it will be observed that the policy was issued in New York upon the receipt of the application, and, as it recites in the policy, "in consideration of the application for this policy, which is hereby made a part of this contract." By the terms of the policy the proofs of death were to be delivered to the company at its home office, in the city of New York. The policy, when it matured, was payable to the beneficiaries in the State of New York. The policy provided that "the annual premium of $814.00 shall be paid in advance on the delivery of this policy and thereafter to the company at its home office in the city of New York on the 29th day of April in every

year during the continuance of this contract." It is clear from this provision that the only place the company had any right to demand the payment of the premium was at its home office, in the city of New York. The beneficiaries could require the acceptance of the premium by the company only at its home office in the city of New York. The obligation of the one was to pay in New York, of the other to accept payment in New York. The company could not demand payment of the premiums elsewhere; the beneficiaries could not require the acceptance of the premiums elsewhere. The payment of premiums and the collection of premiums was business to be done in New York. No forfeiture could occur except for non-payment of a premium at the place where it was payable and where it was solemnly agreed by the parties that the contract was made. This being true, the company had no right to insist upon the payment of the premium or upon a default for the non-payment unless it showed that it had first complied with the notice law of New York, where alone it could exact payment. The validity of any declared forfeiture, then, is made to depend both upon the law of the place where the contract was made and where it was to be performed, these places being identical, to wit, in the city of New York. If the policy were not forfeited under the laws of New York prior to Mr. Hill's death, it was not forfeited at all and was a valid contract at that time. The rule we are contending for is clearly supported by the authorities.

Mr. Justice Harlan, in a case reported in the 142 U. S., 101, on page 109, uses this language:

"We have seen that the bonds in suit were redeemable on the first day of January, 1866, and not before without the consent of the holder, and were payable in pounds sterling with interest at the rate of five per cent. per annum from date, the interest to be paid semi-annually on named days, 'on presenting the proper coupons for the same at the house of Palmer, Mackillop, Dent & Company, London, where the principal will also be redeemed on the surrender of this cer-

tificate.' *The contract, therefore, was one which in all its parts was to be performed in England.* Nevertheless, it is contended that the principal sum agreed to be paid should bear interest at the rate of seven per cent.; fixed by the laws of South Carolina. The only basis for this contention is the mere fact that the bonds purport to have been made in that State. But that fact is not conclusive. All the terms of the contract must be examined, in connection with the attendant circumstances, to ascertain what law was in the view of the parties when the contract was executed. For, as said by Chief Justice Marshall in Wayman *vs.* Southard, 10 Wheat., 1 on p. 18, 'it is a principle, universally recognized, that in every forum a contract is governed by the law with a view to which it was made.' And by Lord Mansfield in Robinson *vs.* Bland, 2 Burrow, 1077, 1078, 'the parties had a view to the laws of England. The law of the place can never be the rule when the transaction is entered into with an express view to the law of another country as the rule by which it is to be governed. Now here the payment is to be in England; it is an English security, and so intended by the parties.'

"Referring to these and many other cases, this court speaking by Mr. Justice Matthews, held, upon full consideration, in Pritchard *vs.* Norton, 106 U. S., 124, 136, that the law upon which the nature, interpretation and validity of a contract depended, was that which the parties, either expressly or presumptively incorporated into it as constituting its obligations."

Again this court in the case of London Assurance Co. *vs.* Companhia de Moagens de Barreiro, 167 U. S., 149, said:

"Under the circumstances we think that this contract of insurance is to be interpreted according to English law. The appellant is an English company. It made the contract in Philadelphia, by its agents, and that contract by its terms was to be performed in English. * * * This is what the parties expressly stipulated for, and it is no injustice to the company to decide its rights according to the principles of the law of the country which it has agreed to be bound by so long as, in a case like this, the foreign law is not in any way contrary to the policy of our own."

"The contract between these parties, however, was in regard to a suit pending in the State of New York; the property attached was there situated; the services to be performed were to be performed there; and the money to be recovered, if recovered at all, was there to be recovered. The contract in short was to be performed in the State of New York. The law of New York therefore, must necessarily govern the contract."

Richardson *vs.* Roland, 40 Conn., 565–572.

In a case cited in the supreme court of Massachusetts Justice Carey uses this language:

"The notes in suit having been made and payable in Louisiana, the question of the validity depends upon the law of that State. If they are void by that law, they are void everywhere."

Stevenson *vs.* Payne, 109 Mass., 378.

The supreme court of New York states the rule that we are contending for in this language:

"It is a general rule of international law that the rights of the parties to a contract, as distinguished from their remedies are to be determined by the law of the place where the contract is to be performed. If a contract be made in one State or country, and it appears upon its face that it is to be performed in another, it will be presumed that the contract was entered into with reference to the laws of the latter, and those laws will be resorted to in ascertaining the validity, obligation and effect of the contract. *This general rule, however, has its exceptions; one of which is that where a contract is declared void by a law of the State or country where it is made it cannot be enforced as a valid contract in any other, though by its terms it was to have been enforced there.*

"Thus, assuming that the contracts in question had been made in Ohio, and that by the laws of that State such contracts are declared void, the courts of this State would be bound also to declare them void, though, by their terms, they were to have been performed here, and though if made here they would have been valid contracts. This exception is required by that just comity and public convenience upon which all international law is founded. *A contract which is*

illegal and void, either by the law of the place where it is made, or that of the place where it is to be performed, is illegal and void everywhere."

Hyde *vs.* Goodnow, 3 N. Y., 266–269.

In another decision it uses this language:

"Under these circumstances, although the suit is brought in this State, the interpretation and validity of the contract cannot depend upon the laws of New York. The *lex fori* governs as to the remedy or remedies for enforcing the contract, but not as to its construction or the legal rights arising under it. These depend usually upon the laws of the place where the contract is to be performed, although where there is anything in the circumstances to show that the parties had specially in view the law of the place where the contract is made this law will govern although the contract is to be performed elsewhere. I see nothing in the present case to indicate that the parties contracted with special reference to the law of Georgia. As no other place was mentioned payment was of course to be made in New Jersey where the principal office of the company was located; the contract was to be performed there, and hence, upon the general principle adverted to the validity of the contract and the rights and obligations of the parties under it must depend upon the law of New Jersey."

Reese *vs.* Ins. Co., 23 New York, 516, p. 521.

The supreme court of Iowa states the rule thus:

"The general rule is well settled that the law of the place where the contract is made is to govern in enforcing and expounding it, unless the parties provide for its execution elsewhere, in which case it is to be governed by the law of the latter place."

Arnold *vs.* Potter, 22 Iowa, 194.

III.

The petitioner is estopped from claiming that the contract was not actually made in the State of New York. It was not competent for it to attempt to prove that the contract was made at any other place than the agreed one.

It is a well-settled proposition of law that parties to a contract may agree upon an assumed fact, base their contract upon it, and if they do so they preclude each from ever relying upon the actual fact, or from offering evidence to overthrow or dispute the agreed fact. It is but the statement in another way of the rule that parties are not at liberty to vary the terms of written agreements by parol testimony, except by allegations of fraud or mistake. Parties are not at liberty, except on allegations of fraud or mistake, to offer evidence to change the terms of a written agreement, or show facts different from those they have agreed upon as true and as the basis of their contract. We claim that that is exactly what the parties did in this case, when they insisted in the application that—

"It is agreed that there shall be no contract of insurance until a policy shall have been issued and delivered by said company, and the first premium thereon paid while the person passed for insurance is in the same condition of health described in this application * * * and the contract of insurance shall be held and construed at all times and places to have been made in the city of New York."

The purpose of this provision is apparent; it can have but one meaning. The parties could have had but one intention in inserting it, and that was to settle forever the question of the place where the contract was actually made.

It says the contract when made, as distinguished from the application in which it was inserted, shall be held to have

been made in New York. The words "contract when made" mean when completed—when it becomes binding on all the parties. The language "shall be held and construed at all times and places" means that the contract as a whole or any stipulation in it when under consideration in court or out of court shall be so construed; that a court shall interpret it and enforce its obligations exactly as it would if made in New York. In fact, the clause is so worded that that place where the contract was made is conclusively proved as soon as the contract is placed in evidence. It was evidently intended to so word the clause that it should never after be open to the parties to show by evidence that the contract was made in any other State than New York. They certainly could have used no language more appropriate to express that intent.

This clause was inserted in the application by the insurance company. It is the language of the company. It was not a clause prepared for this particular contract, but one intended to go into all the contracts. There are many reasons why the company would be desirous of inserting this clause in its contract. Without some such agreement the question of place of contract would frequently be left in doubt or subject to a jury's verdict on possibly conflicting testimony.

In case some or all of the active participants to the transaction were dead, it would be left more or less to conjecture and be difficult for judge or jury to determine what time and what place the last act was done that completed and consummated the contract.

It must be apparent at once that if parties to a contract (especially an insurance company issuing hundreds of policies in different States) had any particular choice as to the place of contract, it would be both unwise and unsafe to leave so important a question open to the recollection of those familiar with the transaction or to letters or written memoranda which might or might not be held evidence

of the transaction, or, if evidence, which might be lost. Certainly is this true of a contract of life insurance, where it is presumed that it will not be terminated or such questions will not arise until the death of the insured, many years after the contract is made. In such a case it is presumed at least that the insured will be dead and that the agent may have passed away or to distant countries and all track of him lost. Even if all parties were expected to be alive, it certainly must be presumed that their recollection of what took place after the expected lapse of time would be indistinct and faulty, even if both would undertake to tell the unvarnished truth.

Prudence would at once suggest the necessity of forever setting at rest, if possible, so important a question as the place of contract. It certainly would be wise to so fix and establish so important a fact that it would never need evidence to establish it; to establish such fact in advance, so that it would not be open to either party to attack or dispute it.

So the insurance company in this case, in the light of its experience, required the insured to agree in advance, as it was competent for them both to do, that the contract when made should be held and construed at all times and places to have been made in New York. They did this, and inserted it in the written contract so that, whenever either party undertook to enforce the contract, the contract itself would contain conclusive evidence of the place where the contract was actually made. They did not leave it open to faulty memories or testimony of unscrupulous witnesses. They closed the door effectually.

If there is any part of this contract that is not open to be varied or contradicted by parol testimony it is the clause providing that New York is the place where the contract was actually made. The only way that the parties could attack this agreement or show any fact contradictory to it would be by allegation and proof that it was inserted by

fraud or mistake. They make no such claim. They simply ask permission of the court to dispute the agreed fact, because they will gain an advantage by the homicide of their own offspring.

There is another reason why the insurance company would be anxious to insert such an agreement in their contract. They claim and it may be admitted that they were issuing policies at that time in many States and to thousands of policy-holders. In many instances the applicant would pay the premium in advance and get a binding receipt making his contract good from the day it was accepted at the home office. In such a case the contract would be made in New York. In many other cases the applicant would not pay his premiums until the delivery of his policy, and thus make the place of contract at the place of delivery of the policy and the payment of the premium.

Experience had taught it that it was good business policy, in a field where competition was active, to accommodate its prospective policy-holders as to payment of the first premium by giving them the choice of payment either at the date and place of the application or on delivery of policy. It knew it could do so safely and still make the place of contract in New York by inserting an agreement like this one in the policy.

Another reason might and probably did influence the company and suggest the advisability of this course. Different courts, on practically the same facts, differed as to the rule establishing the place of contracts. Some courts held that the mailing of a policy from the home office to its local agent in another State was a delivery at the home office. Other courts held that until the policy left the hands of the local agent it was within the control of the company, and the delivery did not take place until the agent handed it to the insured, and that in such cases the delivery took place in the State where this was done by the agent. This rule was still further confused by

the place, time, and manner of the payment of the premium. In some instances the premium would be paid at the date of the application, other times at the date of the delivery of the policy; other times the agent would be indebted to the applicant and undertake to look after the payment; then the question would arise, was payment as of the date of the application, etc.? Still other times a credit would be given the applicant by the agent. Some courts held that a credit so given by a general agent would be good from the date it was made; others held it would not be good until the premium was actually paid. Some courts would extend the rule of the law of the place where actually made, and limit the rule of place of performance, and *vice versa*. Some courts, especially English courts, consider important the place of domicile of the parties; others extend very much the rule of the law of the forum.

There is about as much confusion and about as many rules as there are different appellate courts. A reading of the different decisions on this point of the same appellate court, in most courts, is far from satisfactory. A brief examination of the reported cases in the different appellate courts will show the statement correct.

An insurance company issuing policies in many States would desire as far as possible to have all the contracts measured by the same law. It is fairer to the company and fairer to the policy-holder, *especially in a strictly mutual company*. Under the conflicting authorities mentioned, it would not be safe to rely on simply providing that they should all be performed in one place, though parties ought to be able to rely on that as sufficient. There would be only one safe and sure way to do: settle the question of place of contract or the proper law of the contract.

There is one rule recognized and enforced by all appellate courts. There is one rule upon which there is no diversity of opinion. That is, that parties may provide by agreement that their contracts shall be deemed to have been made in a

certain State or country, and full force and effect will be given such agreement unless in so doing they are trying to evade a public-policy statute of the place where the contract is made.

The company was well aware of this rule. So, to remove all uncertainty, to close the door effectually against any and all doubt, to forever remove any question as to the place where this contract was made, it inserted this agreement into the contract, that—

"It is agreed that the contract when made should be held and construed at all times and places to have been made in New York."

Such an agreement should have full force and effect, because, based on this agreement and in consideration of it, the company bound itself to pay the beneficiaries $20,000 on Mr. Hill's death. On the part of the beneficiaries, they agreed to pay $814 on the delivery of the contract and $814 each and every year thereafter upon the service of the statutory notice on the insured, or suffer the forfeiture of the money paid and their rights under the contract. The contract was finally made on the faith of this agreement as a controlling one at a time when neither party need go on with the consummation of the contract unless this provision was to have binding effect and force. That such was the intention of the parties, at least of the insurance company, cannot be doubted. Either party, at the time this agreement was made, could have required the delivery of the contract and the payment of the first premium in New York, and thus made it a New York contract. Mrs. Hill could have paid the first premium through an agent in New York, and upon the delivery to her agent there of this policy of insurance the company could have required Mrs. Hill to have paid the first premium on the policy in New York and delivered the policy to her at the place. But, instead of this, they did what was perfectly

competent for them to do—agreed that when the premium was paid and the policy delivered it should be held and construed at all times and places to have been done in New York. Having made this agreement, it is fair to assume that both parties relied upon it in fixing the laws of New York as applicatory law and regarded it unimportant where the delivery took effect. Bigelow on Estoppel states the rule as follows:

"The first class of cases under the head of Estoppel by Contract, as stated in the preceding chapter, arises where there is an actual or a virtual undertaking to treat a fact as specifically settled. Stated in full, the general rule of law appears to be this: A fact agreed or assumed to be true, as the basis of a contract must be taken to be true specifically, until the contract itself is lawfully impeached by plaintiff or defendant, or until some legal proceeding is taken to impeach the truth of the (supposed) fact; assuming that the contract itself is not contrary to law. In other words, supposing the contract to be lawful and binding, the party or parties, (it may be one, it may be all) pledging or justly assuming the fact in question will be estopped from taking any position, to the detriment of other parties, inconsistent with the special fact, except for the purpose of reforming the language of a written contract and making it conform to the rule of this agreement. The rule may be illustrated by two or three examples. Thus dealing with a person that occupies a particular position or character, it may be as administrator, executor, trustee, director, agent, or holder of any manner of office, will estop that person, generally speaking, to deny the fact agreed or assumed in regard to his position or character. So a contract based upon one's having a certain title to property will estop the parties, or the party pledging the fact if it be the act of but one, in the performance of the contract, from claiming a different title. And so accepting and treating an article in shipment as baggage may estop owner and carrier from treating it as freight."

Bigelow on Estoppel, 5th ed, 459.

"It is a sound rule of law that a written contract cannot be altered or varied by parol proof. This excellent rule

of law is intended to guard against fraud and perjuries, and cannot be too steadily enforced and supported by courts of justice. * * * This rule prevails equally in a court of equity and a court of law. Generally speaking, the rules of evidence are the same in both courts, and if words of a contract be intelligible there is no instance where parol proof has been permitted to give them a different sense. You can introduce nothing on parol proof that adds to or deducts from the writing. If, however, through fraud or mistake, it is made to speak a different language from what was intended, the estoppel does not apply. These are the only cases that form an exception to the rule. * * * Notwithstanding these matters, the parties to a deed or a contract may agree to bind themselves in this respect by stating a particular state of things as a part or basis of the grant or contract. And when this thing is done with sufficient clearness as to leave no doubt as to the intention, it falls within the general principles that matters which have been solemnly reduced to writing cannot be denied, and constitute an estoppel by deed."

Herman on Estoppel, p. 708, sec. 575.

"That the doctrine of *estoppel in pais* is a most equitable doctrine and one without which the law of the country could not be satisfactorily administered."

"When a person makes to another the representation, 'I take upon myself to say such and such things do exist' and the other man does really act upon that basis, it seems to me it is of the very essence of justice that, between those two parties, their rights should be regulated, not by the real state of the facts, but by that conventional state of facts which the two parties agree to make the basis of their action."

Herman on Estoppel, sec. 1170.

Wharton on Evidence states the same rule in this language:

"If a distinct statement of a particular fact is made in the recital of an instrument under seal, and a contract is made with reference to that recital, it is clear that, as between the parties to such instrument and in an action upon it, it is not competent for the party bound to deny the recital."

Id., sec. 1039.

"We must, however, again emphasize, as bearing on both admissions of rights and admissions of facts, the radical distinction already noticed, between admissions which are contractual and dispositive, and such as are non-contractual and non-dispositive; in other words, between admissions made intentionally, for the purpose of transferring a right, and admissions made casually, for the purpose of narrating an incident, or explaining an alleged right. The contractual and dispositive admission is equivalent to an offer which, when accepted by the other party, makes a contract. Such an admission, as we will presently see, when made as the basis of contract cannot be revoked."

Id., sec. 1083.

"In this view, a party making such a statement, thereby inducing another to enter into a contract with him, is bound to such other by such statement, whether it be true or false. A person, for instance, falsely claiming to be an agent, cannot dispute his statement when sued on it by a party acting on his pretension. A party warranting cannot escape liability by claiming that his warranty was false. Even an honest misstatement, by which the other contracting party is led to enter into a contract, binds the party by whom the misstatement is made."

Id., sec. 1087.

"Hence where parties have knowingly agreed to act upon an assumed state of facts, their rights will be made to depend on such assumption and not upon the truth."

Id., sec. 1146.

IV.

Baxter Case.

The case of Baxter *vs.* Ins. Co., which was referred to with approval by this court in the Cohen case as one where the policy contained a provision expressly making the contract subject to the laws of New York, was one issued on the life of one Joel Mattison, who resided in McKean county, Pennsylvania, where he died and where the policy was pre-

sumptively made. His post-office address was outside of New York. The court of appeals held that his policy could not be forfeited except by service of the statutory notice. This is a complete answer to the three contentions of petitioner, if they need an answer:

1. *The notice in such a case must be served on non-residents of New York* in a case where the statute applies by agreement of the parties.

2. That a provision in substance like the one contained in the Hill policy was sufficient to designate New York as the proper law.

3. That an insurance company of New York making contract in another State with a resident of another State could not subject the contract to the operation of the laws of New York, and then insert in the contract a provision making the contract forfeitable without notice and enforce it; that, having made the contract subject to the law of New York, it could not defend on the ground of forfeiture until it had first shown that it had served the notice; that the agreement to forfeit without notice was itself subject to the notice law.

The provision of the policy appears from the following extract of the opinion of the court:

"The policy itself contained the stipulation that it was a contract made and to be executed in the State of New York, and construed only according to the laws of that State. Aside from the provisions of the policy, and under general rules of law, the contract was subject to the terms and conditions expressed in chapter 341 of the Laws of 1876, as amended by chapter 321 of the Laws of 1877. This statute was a part of the contract in question and governed the rights and obligations of the parties in precisely the same way, and to the same extent as if all its terms and conditions had been actually incorporated into the policy."

Baxter *vs.* B. L. I. Co., 119 N. Y., 450, on p. 454.

We filed in the Sears case a certified copy of the pleadings and case, which may also be found in respondent's brief in that case.

V.

Choice of Law—Freedom of Contract.

Strictly speaking, there is no such thing as freedom of contract, and frequently no such right as choice of law. Parties are free to contract only where a law or public policy does not intervene to prevent or control. Frequently parties are free to choose the State or country that shall dominate or control their contract. Such was the condition of the parties to this contract. But when their choice is made, the law of the State or country operates to its full extent. They may select the State whose laws shall operate on the contract, but they cannot in any manner control the operation of those laws, at least to no greater extent than one domiciled at the agreed place of contract.

In considering such a question, courts first determine what is the proper law of the contract, this of course in a case where the parties have a right of choice of the law. Having determined the place of contract or the proper law of the contract, they then determine the question of the validity of the contract, or any provision in it in reference to such laws. The court, having once determined the proper law of the contract, will give the contract just the effect or force that such law provides such a contract shall have; no more, no less. If the law is one regulating the performance of contracts, or payment of money on contracts, its laws will control on such matters. As Mr. Dicey, in his work on "Conflict of Laws," says:

"They (English judges) first try to decide what is the country *by the law of which a contract is substantially governed, and ask themselves whether a given contract is an English or a foreign, e. g., a French contract.* In determining this, they

take into account both the terms of the contract itself and all the circumstances of the transaction, such as the character of the parties, the place where the contract is made, and the place where it is to be performed, and so forth. *When from this general survey of facts they have made up their minds as to which country the contract belongs, then they hold not only the effect, but also the validity of the contract is governed by the law of such country.* If the contract is an English contract they determine its validity no less than its interpretation by reference to English law. If the contract is a French contract they determine both these points by reference to French law. That this is the train of thought in the main followed by our judges is apparent from the examination of such cases. But if this is so, two results follow. The first is that English courts do not draw a broad distinction between the law governing the interpretation or effect and the law governing the legality or validity of a contract. The second is, that as the law which governs the interpretation of a contract is the proper law of the contract, or in other words, the law or laws intended by the parties to apply to it, we are driven to the conclusion that, in general, and at any rate indirectly, the validity of a contract is governed by the proper law.

"This theory is consistent not only with the language of the English courts, but, what is of more consequence, with their mode of thought. *They hold that a contract is governed by the law of the country with which it has most substantial connection, or, to put it more shortly, to which it belongs.*"

The parties then may select the State to which they wish to subject their contract. Having done so, any public-policy law acts upon such contract regardless of whether the parties desire it to do so. Public policy or statutes declarative of public policy do not depend for their enforcement upon consent of the parties, but act regardless on every contract made within their reach or brought within their influence. If parties are free to select the proper law of their contract, that is the full extent of their freedom. When parties voluntarily subject their contract to the operation of the laws of a particular State, they subject the whole of it to those laws,

especially if they make that the place for the enforcement of their contract.

They may be free to choose the place of contract, but that does not mean that they are free to play "hide and go seek" with the laws or the public policy of that place. If they do not like the laws of a particular State or country or its public policy, they must go elsewhere for the proper law of their contract. If one does not like the taste or effect of the wines of France he ought not drink them. If he does he will get both. If I do not like the laws of Persia relative to persons or property, I should not subject my person to its jurisdiction or make my contracts in reference to its laws.

A chemist might as well put bicarbonate of soda in a crucible containing nitric acid and argue that the acid would not affect it because he did not desire or intend that it should. He had the choice of doing with his soda as he saw fit. He need not subject it to the operation of the acid. Having done so, he must expect the result that by the law of chemistry he knew would occur. So with one making a contract. If he has the choice of subjecting his contract to the operation of the laws and public policy of a State different from that of the place where it is made, and he does so, he must expect it to take the form and be read and enforced in the light of the laws and public policy of that State. He has no control over the law and public policy of such State. When he once has committed his contract to the operation of the laws of such State, they act upon it exactly as if made there. A court enforcing the laws of a State does not shut its eyes to any provision in the contract contained and to be performed in it, but reads it in conformity to the law of the State; enforces that which its laws favor, ignores that which its laws abhor.

Parties living in one State may physically repair to another State solely for the purpose of making their contract in that State and subjecting it to the operation of the laws

thereof, or they may remain at their domicile and provide in the contract that it shall be deemed to have been made in the other State and be wholly performed therein. The effect in either event is the same. They have irrevocably submitted their contract to the operation of the laws and public policy of that State. Like the chemist with his bicarbonate of soda, they have voluntarily placed it in the crucible of the public policy of that State, which will act upon it regardless of their desire.

Petitioners admit that the Hill contract was in all respects to be governed by the laws of New York except in the one matter, the notice law. That being so, it was, in the language above quoted from Mr. Dicey, "substantially governed" by or had "most substantial connection" with the laws of New York; hence a New York contract in its entirety. On page 40 of their brief they say:

"The parties themselves have not by any agreement or convention in the policy expressly agreed that the statute (premium notice of New York) should govern. It is, indeed, true that this court in the Cohen case said:

"It is not doubted that a contract by an insurance company of New York, executed elsewhere, might by its terms incorporate the laws of New York and make its provisions controlling upon both the insured and the insurer."

"We are not, of course, questioning this proposition, but are simply showing that the application and the policy did not by their terms incorporate this premium notice law of New York and did not by their terms make its provisions controlling upon both the insured and the insurer.

"The language expresses the intent of the parties that the contract when made should be held and construed to have been made in New York city, but it expresses no intent as to what particular statutes, if any, of New York State shall control the actions of the parties therein."

Petitioner seems to contend that parties in subjecting their contracts to the laws of another State may treat its laws or its public policy like one might goods on a bargain

counter—buy what he desires and reject the balance. Such is not the law.

It might be well to again call the attention of the court to the fact that petitioner in effect admits that New York was the place of performance of the contract. It argues at great length that we ought not to recover or enforce performance because we did not perform on our part. In what did we not perform? It says we did not pay all the premiums required by the policy. Three payments of premiums was the part we were to perform. They thus admit the premises of our argument that New York was the place of performance on our part, upon condition of the service of the statutory notice, because the policy provides, in the body of it: "*The annual premium of* $814 *shall be paid in advance on the delivery of this policy and thereafter to the company at its home office in the city of New York*" (Record, page 6). It is true that the policy provides, in a subsequent provision, that—

"*Each premium* is due and payable at the home office of the company in New York; but will be accepted elsewhere when duly made in exchange for the receipt signed by the president or secretary."

But this would be true without such proviso. It does not change the fact that New York was the only place it could require of us by notice to pay the premium, or the only place we could compel it to accept the premium. It really admits in its brief that the contract may be considered to have been made in New York. It says:

"The clause in the application on which the plaintiffs rely merely is to the effect that the contract shall be considered as having been *made* in New York. This particular clause contains nothing concerning performance of the contract (*i. e.* payment by the company of the amount insured), nor does it say anything concerning performance of conditions by the insured necessary to the continued existence of the contract, such as payment of the premiums.

"The natural meaning of the clause in the application is that the making of the contract, *i. e.*, the entering into of the

contract, or the creation of the obligation and all the elements involved in these ideas, are to be governed and determined by the law of New York, *e. g.* mutual assent, form.

"As the clause refers merely to the making of the contract, that is, its initiation, it has nothing to do with the performance of the contract by the company nor with the performance of conditions by the insured. The clause has reference solely to the *lex loci celebrationis contractus.* It has nothing to do with the *lex loci solutionis.*"

So we have the admission of petitioner that the contract may be considered to have been made in New York. And the contract certainly provides for the payment of the premiums in New York—for performance in New York. It also provides for payment of the policy by the company to the beneficiaries in New York. Further as above stated it claims we did not perform—did not pay premiums in New York.

When the contract is made in one State and to be performed there the authorities are all harmonious on the rule as to the law controlling its validity. Where a contract is made in one State to be performed in another State and there is no express provision of the contract adopting the latter State as the place of contract, yet as we have already shown, practically all the authorities are agreed that its validity as a whole is dependent upon the laws of such State.

Mr. Dicey, in his work on Conflict of Laws, page 555, says:

"The proper law of a contract is, in a great number of instances, the law of the country where the contract is to be performed. The assertion therefore of many writers, that the essential validity of a contract is governed by the law of the place of performance does not in its results differ greatly from our rule" (the English rule).

Id., 765:

"The essential validity of a contract is to be tested in the main by the law of the place of performance

(*lex loci solutionis*), though it may occasionally depend on the place where the contract is made (*lex loci celibrationis*); *in any case it does not depend on the intention of the parties.*"

Id., 764:

"*Parties who contract under a given law cannot at their will make a contract legal or valid which the law declares to be illegal and invalid.* It is also plain in many cases that a contract which is unlawful by the place of performance should be held unlawful elsewhere. The rule which prevails as to the whole prevails as to any part."

Mr. Foote reaches the same conclusion (page 375):

"The legality of a contract, depends generally upon the law of the place of intended performance.

"*An act which is illegal by the law of the place where it is intended to be done cannot be validly contracted for in any place.*"

Id., 364:

"Wide as the operation necessarily is which is given to the *intention* of the parties to a contract, it is plain that it can have no effect upon the question of the legality or illegality of the thing contracted for. *No law can permit itself to be evaded, nor can it, consistently with the principles of international jurisprudence, sanction the evasion of a foreign law.* Thus, if the thing contracted to be done is illegal by the law of the place of the intended performance, the contract should be held void, wherever it was actually entered into, by all courts alike."

Mr. Foote, 369–370, also holds that an agreement, the making of which is positively prohibited by the law of the country where made, should and would be held void in all other countries.

Mr. Minor, section 175, says:

"A contract may be invalid because the act to be done in performance thereof is prohibited by law. *A* makes a contract with *B* in New York, by which *A* promises to do an act in Virginia. The act is prohibited by New York

law, but not by that of Virginia. A moment's analysis will show that the Virginia law should govern and the contract should be sustained. The legislature, in prohibiting the act to be done, must, of course, be presumed to contemplate the doing of the act in New York; it can have no concern with the act done in Virginia. On the other hand, if we suppose the act agreed to be done is permitted by the law of New York, but is prohibited by the law of Virginia, the same conclusion must be reached. *No matter in what State the validity of a contract is questioned, a decent comity will require the courts of every State to refuse to enforce a contract the purpose and effect of which is the performance of an act in another State, which is prohibited by its laws.*" * * *

Mr. Story, in his Conflict of Laws, page 325, says:

"Generally speaking, the validity of the contract is to be decided by the law of the place where it is made, *unless it is to be performed in another country; for, as we shall presently see, in the latter case the law of that place is to govern, if valid there it is by the general law of nations held valid everywhere.*"

Id., page 327:

"*The same rule applies vice versa:* if void or illegal by the place of the contract (or performance) they are generally held void and illegal everywhere."

Id., 376:

"But where the contract is, either expressly or tacitly, to be performed in any other place then the general rule is, in conformity to the presumed intention of the parties that the contract, as to its validity, interpretation, is to be governed by the place of performance."

Id., 416–417:

"But several (foreign jurists) and indeed most of them do expressly and directly recognize the rule that when a contract is made in one place and is to be performed in another, not only may the law of the latter be called the *locus contractus, but it ought in all respects,* except as to formalities and solemnities and modes of execution, to be deemed the rule to govern such cases. In the next place, when these

foreign jurists speak of *payment* or performance they all agree that the contract must be governed by the law of the place of payment or performance and not by the law of the place where the contract is made."

This is all we are contending for here—that our duty to pay and the results flowing from non-payment are to be governed by the law of the place where payment alone could be exacted; that under the law regulating payments of premiums where we were to pay no premium was due until after service of the notice.

Mr. Rorer, in his work on Interstate Law (page 50), says:

"The law of the place where performance is to occur governs in respect to the validity and performance of contracts, made in one State, but to be performed in another, as, for instance, in commercial contracts, the time, manner, and circumstances of presentation and demand, for acceptance, *payment* or protest, the rate of interest if none be designated, and whatever else relates to the fulfillment of contract or obligation. To quote again from the highest national court, 'Matters connected with * * * performance are regulated by the law prevailing at the place of performance.'"

"The answer is that the validity of the contract to each of its elements is to be controlled by the law of the situs of the elements; by the *lex loci celebrationis*, if the question relates to the making of the contract; *by the lex loci solutionis, if it relates to the performance of it;* and by the *lex loci considerationis* if it is the consideration of the contract whose sufficiency is or legality is disputed" (Minor, sec. 167).

"If a place is designated for the place of payment of money due upon a policy of insurance there will be no difficulty in fixing that place as the *locus solutionis* of the insurance contract" (Minor, 166).

"The reason is that the parties sometimes attempt to cover their real intention of the place of performance by falsely naming a place which they really do not intend to be the true *locus solutionis*. This is done in order to evade the law of the place of performance when it would condemn the contract. In such cases, when the *locus solutionis* is of importance, it is the duty of the court to disregard the false

witness of the parties' contract and to ascertain the place of performance really intended" (*id.*, page 379).

Mr. Dicey reviews the conclusions of what he terms the best writers on this point as follows (page 766):

"Story holds that the nature, the obligation, and the interpretation of a contract are all governed by the same law, and this law, though at first sight one might suppose it from his language to be the law of the place where the contract is made, clearly is with him the law which the parties intended to adopt.

"Mr. Foote, no doubt following in this, it must be admitted, the language of Story, holds, as already pointed out, that the *lex loci solutionis* must be decisive. But all that is true in this theory is met by the consideration that the *lex loci solutionis* is more often than not the proper law of a contract, *and that in general a contract is invalid which cannot lawfully be performed at the place of performance.*

"Westlake's opinion comes very near to the admission that the proper law of a contract is the law governing its validity.

"'It may,' he writes, 'probably be said with truth that the law by which to determine the intrinsic validity and effects of a contract will be selected in England on substantial considerations, *the preference being given to the country with which the transaction has the most real connection*, and not to the law of the place of contract (meaning the place where actually made) as such.'"

The statute of New York is one strictly regulating performance of an insurance contract on the part of the insured. It states the exact terms on which an insurance company may exact payment of premiums (performance of the contract) from the insured. It does not pretend to deal with any other phase of the contract. It provides that the insured will not suffer forfeiture of his contract on account of non-performance on his part—non-payment of the premiums—except on the condition imposed by it, the service of the notice and failure to pay thereafter.

As we have shown, this court has recognized and enforced this doctrine in many cases. In the Phœnix Ins. Case, 129 U. S., 387, Justice Gray says:

"This review of the principal cases demonstrates that according to the great preponderance, if not the uniform concurrence, of authority, the general rule, that the nature, the obligation and the interpretation of a contract are to be governed by the law of the place where it is made, unless the parties at the time of making it have some other law in view, requires a contract of affreightment, made in one country between citizens or residents thereof, and the performance of which begins there, to be governed by the law of that country, unless the parties, when entering into the contract, clearly manifest a mutual intention that it shall be governed by the law of some other country. There does not appear to us to be anything in either of the bills of lading in the present case, tending to show that the contracting parties looked to the law of England, or to any other law than that of the place where the contract was made."

Again in London Assurance case, 167 U. S., 149:

"*Generally speaking, the law of the place where the contract is to be performed is the law which governs as to its validity and interpretation.* Story in his work on Conflict of Laws, sec. 280, says: '*But where the contract is, either expressly or tacitly, to be performed in any other place, there* the general rule is in conformity to the presumed intention of the parties, *that the contract as to its validity, nature, obligation, and interpretation*, is to be governed by the law of the place of performance. This would seem a result of natural justice."

And again in Eudora case, 190 U. S., 169:

"It has often been stated that the law of the place of performance determines the validity of a contract."

"A contract which is illegal and void, either by the law of the place where it is made, or that of the place where it is performed, is illegal and void everywhere (Hyde *vs.* Goodnow, 3 N. Y., 266–269)."

"A contract for a loan made payable in a foreign country may stipulate for interest higher than allowed at home, and if the contract is illegal there it will be illegal everywhere."
Bank of Louisville *vs.* Young, 37 Mo., 398.

"The notes of suit having been made payable in Louisiana, the question of the validity depends upon the law of that State. If they are void by that law, they are void everywhere."
Stevenson *vs.* Payne, 109 Mass., 378.

But the most important of all cases decided by this court on this point is the case of Knott *vs.* Botany Worsted Mills *et al.*, 179 U. S., 69. This court held in that case that parties having made their contract in part only to be performed in this country could not avoid, by stipulation or waiver, a public-policy statute enacted by Congress. The Harter act under consideration in this case established a public policy within the limits of the United States to be applied to every contract (of the nature specified) made or to be performed in any part of this country, but we claim to no greater extent than the notice law of New York on contracts made or to be performed, or both, in the State of New York. There is certainly no legal or moral distinction. A public-policy statute of a State is to be given just as much effect and force within its jurisdiction or on contracts brought within its jurisdiction as the statutes of Congress have within the limits of the United States.

The facts appear in the opinion of the case by Mr. Justice Gray, as follows:

"The Botany Worsted Mills, a corporation of New Jersey, and Winter & Smillie, a firm of merchants in the city of New York, respectively owners of two separate lots of bales of wool, shipped at Buenos Ayres for New York on board the steamship *Portuguese Prince*. * * * The *Portuguese Prince* was a British vessel belonging to a line trading between New York and ports in the River Plata, Brazil and the West Indies, loading and discharging cargo and having

a resident agent at each port. The bills of lading of the wool, signed at Buenos Ayres December 21, 1894, gave her liberty to call at any port or ports to receive and discharge cargo, and for any other purpose whatever; *and purported to exempt the carrier from liability for 'negligence of masters or mariners.'*

* * * "Each bill of lading also contained the following clause: 'This contract shall be governed by the law of the flag of the ship carrying the goods, except that general average shall be adjusted according to York-Antwerp rules, 1890.' * * *

"We fully concur with the courts below that the damage in question arose from negligence in loading or stowage of the cargo, and not from fault or error in the navigation or management of the ship, for the reasons stated by the district judge." * * *

"This express provision of the act of Congress overrides and nullifies the stipulation of the bill of lading that the carrier shall be exempt from liability for such negligence, and that the contract shall be governed by the law of the ship's flag."

The language of the Harter act is no stronger in substance against the waiver of its provisions than the language of the notice law of New York is, especially as construed by the courts of New York, particularly in the case of Strauss *vs.* Ins. Co., 67 N. Y. S., 509; the same case on appeal, 70 N. Y. S., 1149; the same case in the court of appeals of New York, 63 N. E., 347, decided since this case was here before, the case being affirmed in each instance on the opinion of Justice Gaynor, rendered at the trial term, found in 67 N.Y.S., 509, or the Fischer case, to which we will call attention.

From the language of the opinion it is apparent that the contract in the Knott case was made in Buenos Ayres. The vessel was an English vessel, and it was agreed that the contract was to be controlled by the law of the flag of the ship or the English law; but it was also provided that the contract was to be in part performed in the United States, and it appeared that one of the parties to each contract was a

citizen of this country. (In this case one of the parties was a citizen of New York.) On this ground alone the court held that it was subject to the Harter act, and that the provisions of the Harter act could not be waived. The parties to the contract in the Knott case were in Buenos Ayres and had all the freedom of contract in reference to the law of the United States that petitioner and Mrs. Hill had in Washington in reference to the laws of the State of New York. Neither party need have entered into the contract unless he chose to do so. In this case neither Mrs. Hill nor the insurance company need have made the place of performance in New York unless they desired its validity to be determined by the laws of that State.

They could have provided that it should be performed in Washington. Neither party need have consented to the agreement that the contract when made should be held and construed at all times and places to have been made in New York; but both parties, desiring to subject their contract to the laws of New York, made that the place of contract and the place of performance. Having done so, they irrevocably subjected the contract to the operation of the laws of that State.

All authorities agree if a contract is made in one State parties cannot evade its public policy or a law declarative of its public policy. That was the case of Clement *vs.* Ins. Co., 140 U. S., 226. Speaking of this point, the circuit court of the third circuit said:

"Defendant puts the case on the ground that parties making a contract may under some circumstances agree for the law of a State or country foreign to the place of contract. As a general principle this cannot be disputed; but, also, clearly it has no application when the result thereof would be to accomplish an evasion of the statutory provisions declaring a rule of public policy with reference to contracts made within the jurisdiction where the legislation is enacted."

Albro *vs.* Ins. Co., 119 Fed., 629.

To the same effect is Ins. Co. *vs.* Harris, 94 Tex., 25; 57 S. W., 635.

Mr. Justice Brewer, sitting as circuit judge, who tried the Clement case, 32 Fed., 273, in the first instance, recognized this distinction and cited the following opinion of Judge Treat with approval:

"Inasmuch as the policy sued on declared that it rests on the basis of answers made to the application, and that said policy was to be issued at the home office in New York on a return thereto of the application, can the plaintiff avail himself of the force of the Missouri statutes? The defendant company was doing business in Missouri, with privileges granted to it here, when said insurance was effected. It may be that formal acceptance of the proposal was, by letter of the contract, to be consummated in New York. The broad proposition, however, remains, no artifice to avoid which can be upheld. The statutes of Missouri for salutary reasons permit foreign corporations to do business (in Missouri) on prescribed conditions. If, despite such conditions, they can by the insertion of clauses in their policy withdraw themselves from the limitations of the Missouri statutes, while obtaining all the advantage of its license, then a foreign corporation can by special contract upset the statutes of the State and become exempt from the positive requirements of law. Such a proposition is not to be countenanced. The defendant corporation chose to embark in business within this State under the terms and conditions named in the statutes. It could not by paper contrivance, however specious, withdraw itself from the operation of the laws, by the force of which it could alone do business within the State."

Fletcher *vs.* Ins. Co., 13 Fed., 526, p. 528.

In the above opinion Judge McCrary concurred.

Wall *vs.* Ins. Co., 32 Fed., 273.

Berry *vs.* Ins. Co., 46 Fed., 239.

This distinction is clearly shown by Judge Ross in the case of Nixon *vs.* Ins. Co., 81 Fed., 796, as follows:

"When the application and the applicant's money were accepted by the society the contract between the parties became complete. This was done in the State of New

York. Not only so, but as has been seen all the conditions of the policy were performed in the State of New York; the premiums were to be paid in that State; proof of loss, if any, was to be there made, and the payment agreed to be made by the defendant corporation in the event of the death of the assured was to be made in the State of New York. (All these statements of fact apply to this case.) It would seem to be very clear, therefore, that the rights and obligations of the respective parties are to be measured and controlled by the laws of that State, subject, perhaps, to any additional limitations or conditions imposed by the statutes of the State (then Territory) into which the defendant corporation went to solicit the business in question, for it may be true that every foreign corporation that enters a State other than that of its creation, and there transacts business, does so in subordination to the statutes of the State permitting its entry therein, and that no business transacted by virtue of the privilege thus conferred can, by any sort of contract, be removed from the operation of the statute of the State permitting the business to be transacted. But in the present case, as has been said, there is no Washington statute affecting that portion of the policy here in question. * * * There is nothing to the contrary in the case of Society *vs.* Clements, 140 U. S., 226, so much relied on by the plaintiff."

This case was approved by the supreme court of Missouri in the case of Cravens *vs.* N. Y. Life Ins. Co., 50 S. W., 519, in which case there was a provision in the contract attempting to make New York the place of contract to avoid the effect of a statute of Missouri. In the Cravens case the policy was actually delivered in Missouri and the court held that it was a Missouri contract, and that it would not give effect and force to a provision which would in effect and indirectly waive the statute of Missouri; but it also clearly states that if there was no statute of that character or description in Missouri, it would have held the contract to have been a New York contract.

After quoting from the opinion of Judge Ross in the Nixon case as above set forth with approval, it says:

"It is manifest from this decision that if the statute of Washington had prohibited the forfeiture of the policy upon the ground of the non-payment of premiums when due, as do the statutes of this State, the conclusion reached would have been different. The rule to be deduced from the authorities seems to be that, when no statute intervenes prohibiting it, a corporation doing business by permission of another State from that of its corporation may by contract make the law of the State of its incorporation the applicatory law of the contract, but that, when the laws of the State in which it does business by license prohibits such corporations from making certain kinds of contracts, they can only act in accordance therewith."

A brief review of the cases will show that the courts in New York and out of New York have all held alike that the notice law of New York could not be waived. Whenever courts have found enough in a contract of insurance to show that the contract was in the main or properly speaking a New York contract, they have all held a clause attempting to waive the service of the statutory notice was of no avail. We will now briefly examine those cases:

VI.

Where a contract is made in New York the service of the statutory notice cannot be waived by a provision to that effect in the policy.

It will not be necessary to discuss this point. The courts of New York have effectually settled it by holding against the validity of such a clause. It is necessary only to cite two cases from New York on this point. In the case of Strauss *vs.* Insurance Company, 67 N. Y. S., page 509, it appears that the contract was made in New York. After the policy was issued and the first premium paid, the insured defaulted in the payment of a subsequent premium. Sub-

sequent to the default, the company permitted him to pay the defaulted premium, in part by note and the balance in cash. *The note contained a condition that "the policy should be forfeited without notice to any party or parties unless paid when due."* The insurance company contended that the premium having been overdue and paid by note that the condition in the note that the policy should be forfeited without any notice, after it became due, was a good and valid waiver of the service of the statutory notice. In answer to this contention, the court says:

"It (the agreement that the policy should *be forfeited without notice*) has to be coupled with the like condition of the policy itself that the policy shall be null and void on failure to pay any premium or note given therefor on the day it becomes due, and can be given no greater force. *The statute limits the operation of such agreement of forfeiture so that they can only take effect after the prescribed notice of forfeiture. It is prohibitory and cannot be evaded.*"

The opinion in this case was affirmed by the New York supreme court on the opinion of the lower court, 70 N. Y. S., 1149, the court saying:

"Judgment affirmed with costs on the opinion of Justice Gaynor, 67 N. Y. S. 509."

This case was again affirmed by the New York court of appeals, 63 N. E., 347, the court saying:

"The only default on the part of the plaintiff was a failure to pay a part of the premium on the due day and as the defendant had never served the statutory notice, it was not in a position to work a forfeiture of the policy."

The language of the New York court is very similar to that of Judge Ross, speaking for the circuit court of appeals:

"The statute of New York prescribes the condition upon which a policy may be forfeited for non-payment of a premium. The statute is mandatory and controls the contract.

Its provisions are not subject to be set aside or waived either by the company or the assured or both together."

Nixon *vs.* Ins. Co., 81 Fed., at p. 802.

The case of Fischer *vs.* Ins. Co., 167 N. Y., 178, decided by the New York court of appeals, is also important.

The following appears under point II of Appellant's Brief, page 9:

"But conceding that the admission of the affidavit was error, it was immaterial error and not ground for reversal by the appellate division. The assured waived notice and the protection of the statute. At the time of the trial no consideration of public policy prevented this waiver from becoming effectual.

The application for insurance contained the following provision:

It is expressly agreed that the provisions of the policy for the assurance of paid-up insurance are accepted in substitution and in waivers of any law of any State relating to the lapse of forfeiture of policies of life insurance.

The policy itself contained the following provision:

Notice that each and every premium is due at the dates named in the policy is given and accepted by the delivery and acceptance of this policy, and any further notice required by any statute is hereby contracted to be expressly waived.

These waivers were effectual unless reasons of public policy rendered them ineffective."

The quotations from the policy contained in the above may be found in appeal book in said case on page 9 and page 15.

The counsel then argues at length that the insured lived until after the amendment to the notice law by the act of 1897 and should be given full force and effect. They admitted that it would probably not be effective on the act of 1876 or 1892.

The court did not mention this contention in its opinion, but overruled it in affirming the decision of the lower court.

So it is clear that the highest court of New York has affirmatively held that this statute could not be waived in the two cases cited.

The supreme court of Michigan in the case of Warner *vs.* Ins. Co., 100 Michigan, 158, 58 N. W., 664, had before it a case involving an insurance contract which was made also in New York, the corporation being a Hartford insurance company. The policy contained the clause that "notice that the premium is payable to the association at Hartford, Connecticut, on the first week of each and every month, is given by the policy and accepted and any further notice is expressly waived." The court said:

"The notice sent to the insured, in the present case, did not comply with this statutory provision. The design of the statute is apparent. A policy in a regular life company fixes both the time of payment of premium and the amount thereof; yet the same statute provides that no life insurance company can declare forfeiture or lapse any policy by reason of the non-payment of any premium without notice, and prescribes what such notice must contain. It further provides that in case the payment is made within the life of the notice it shall be taken to be in full compliance with the requirements of the policy, anything therein contained to the contrary notwithstanding. These statutory provisions form a part of the contract of insurance and cannot be waived by the parties."

Warner *vs.* Association, 100 Mich., 158.

Like decisions may be found on similar statutes, where the insurance company contended as here that the parties had the right to waive them.

"The evident purpose of this legislation was to strike down, in this class of cases, literal warranties so far as they may be resorted to for the disreputable purpose of enforcing actually immaterial matters. This provides a rule of construction for the purpose of preventing injustice; and it is as much the duty of courts to enforce such rules as it is to administer the statutes of frauds and perjuries. It would be

contrary to public policy to recognize the right of parties to circumvent the law by setting up a waiver such as was insisted on in this case. The court was therefore right in holding that the — was invalid."

Hermany *vs.* Life Association, 151 Penn., 17, on p. 24.

Judge Brewer, when sitting as circuit judge in the western district of Missouri, had occasion to review this question. He says:

"Such seems to have been the thought of the Missouri legislature, and it evidently intended by its legislation to provide a fixed and absolute rule applicable to all cases, absolute and universal, because if it applied only in cases in which the policies were silent, or if it could be waived or changed, a child can see that it would protect only so far as the insurance companies were willing. So, although no words of penalty are attached, no express denial of the right to waive, in fact, no words of negation in any direction, yet it seems to me fair to say that the affirmative language of this statute discloses a public policy which no court ought to question or refuse to enforce (Railway Co. *vs.* Peavey, 29 Kan., 169). The legislature has by this language declared a rule in respect of forfeitures in life-insurance policies; it has thus established the policy which it believes should obtain in this State, and, though sitting on the Federal bench, it is my duty to administer the laws of this State in the spirit in which they were enacted, and to uphold both their letter and their spirit."

Wall *vs.* Equitable Assur. Soc., 32 Fed., 273, on p. 277.

Overruled Cases Cited by Plaintiff in Error on Question of Waiver of the Statute of New York.

In the Phinney case counsel for the plaintiff in error cited certain authorities in support of their claim that the waiver clause of the policy overrides the statute. Certain of them have since been overruled.

The case of Insurance Co. *vs.* Curray, 13 Bush, 312, was distinctly overruled in the case of Ins. Co. *vs.* Rudwig, 80 Ky., 223, on page 235, as follows:

"And when parties have entered into an insurance contract since the adoption of this statute they must be held as contracting with reference to the statutory provision, and, we might add, subject to a like rule, recognized by this court regardless of the statute, and therefore that portion of the opinion in the case of The Farmers' and Drovers' Bank against Curray, expressing a contrary view, is overruled."

The cases of Desmazes *vs.* Ins. Co., 7 Fed., 529, and Caffery *vs.* Ins. Co., 27 Fed., 25, both relating to the law of Massachusetts passed in 1861 and holding to the effect that that statute could be waived, are disapproved, the first named specifically and the latter on principle, in the case of Holmes *vs.* Ins. Co., 131 Mass., at page 64. They are cited also with disapproval by Judge Dillon in the case of White *vs.* Ins. Co., 4 Dill., 177; also in the cases of Griffith *vs.* Ins. Co., 101 Cal., 627, and Ins. Co. *vs.* Rudwig, 80 Ky., 223, on the ground that they were contrary to the great weight of authority. If they are, as claimed by plaintiff in error, they are surely contrary in principle to the case of Clements *vs.* Ins. Co., 140 U. S., 226. It is to be noted, however, that in the Desmazes case the alleged waiver took place subsequent to the delivery of the policy, and *was supported by a new consideration*, viz., the acceptance of a new (paid-up) policy in lieu of the old. In the Caffery case the effect of the holding is that in a forfeitable policy the anti-forfeiture law of Massachusetts could not be waived, but could be waived by the parties adopting in the first instance a policy non-forfeitable in any event. The other cases cited on this proposition are so clearly not in point that we shall not discuss them.

VII.

Where parties to a contract by an agreement make the place of contract and the place of performance in a State different from that where the contract is delivered, they cannot, by inserting an agreement in the contract, waive a public-policy statute of such State.

We think we have clearly demonstrated that this court must construe the contract as the parties agreed that it should be construed, as one made in New York; that neither party at the trial were at liberty to assail, dispute, or vary the agreement of the parties that the contract was made in New York, and evidence tending to show the contrary must be disregarded.

In addition to this, both parties agreed to perform their part of the contract in New York, and for that reason the validity of their contract or any stipulation in it must stand or fall by the law of the place where each party agreed that it was made, and where they had the right to call upon the courts to enforce it and construe it. We have also shown that the highest courts of New York have held in the Strauss, Fischer, and other cases that parties could not, by an agreement made in advance of the due date of the premium, waive even in writing the service of the statutory notice. The courts uniformly hold that the invalidity of such a clause is the same where the contract is made in the State where the public-policy statute is in force or where such State is the agreed place of contract. In either event the parties are conclusively presumed to have contracted with a view to the law of the place where made and to be performed, or where they agree that it shall be considered as made and provide that it shall be performed. I feel safe in saying

that no case can be found holding to the contrary. If there was a case anywhere in the books or in any court, whether of low or high degree, the attorneys for the insurance company would surely have found it. With all the diligence they have used they have not cited a single case holding the contrary, though this is the sixth time they have urged this point before this and the lower courts. It is evident that this court so regarded *this point* when the case was here before. It was argued at great length and persistently by petitioner, consuming twenty-seven pages of the brief. It was the one common point standing at the very threshold of the Phinney, Cohen, Allen, and Sears cases commanding the attention of the court. It was the one point and only point that was common to all the cases which if decided in favor of the insurance company would effectually and for all time have disposed of each and all of them. This being true, it is fair to presume and conclude that this court did not consider the point well taken or it would have decided simply this one question and ended the whole matter, and thus have avoided the burden to itself of going into the cases at great length, writing as many opinions upon the different points as there were cases and deciding several important and difficult questions. This court would not have traveled this long and difficult route when it could have taken a short and certain one that would have ended all the cases and all the trouble both to the lower court, the circuit court of appeals, and the litigants. This court would not have sent these cases back to be tried again in the lower court and left this question to rest on the decision of the circuit court of appeals in favor of respondent if it had not agreed with that court that it was invalid.

The precise point we are discussing has been before the courts frequently. No matter where the contract is found to have been made, if there is sufficient in the contract to make New York the proper law, the courts have uniformly held that waiving clause was a nullity. The decision of the

circuit court of appeals is supported by abundant authority. In no case that we cite was the intention of the parties to make the law of New York the applicatory law more clearly expressed than in this and in many cases not nearly so much.

In the case of Insurance Company *vs.* Orlopp, 61 S. W., 336, the contract was made in Texas, to be performed in New York, and it was further provided in the contract—

"That the said contract or policy should be construed and governed by the laws of New York."

The court held that—

"*The requirements of such a statute cannot be waived by the parties.* * * * We come, then, to consider the terms of the statute just as if they were literally printed in the policy, as we are required to consider and construe any other written contract: except as it *was proved to be the statute law of New York, its provisions are mandatory and cannot be waived by the contracting parties.*"

In the case of Griesemer *vs.* Insurance Company, 10 Washington, 202, the court said:

"From these facts it would appear that this policy was issued in the State of Pennsylvania and should be governed by its laws,"

but for the fact that the policy contained the agreement that—

"This policy is a contract made and to be executed in the State of New York and shall be construed only according to the charter of the company and the laws of that State;"

Held that—

"This provision made the law of New York the controlling laws."

In the Griesemer case the policy contained the provision that—

"Notice that each and every payment is due at the date named in the policy is given and accepted by the delivery and acceptance of this policy and any further notice required by any statute is hereby expressly waived."

It will be observed the two provisions are identical. It was urged in that case at length and forcibly that the contract having been made in Pennsylvania, this provision was valid and waived the service of the statutory notice. The court does not mention this point in its decision, but overrules it, in that it affirmed the lower court, which had held that the provision was nugatory. If this point had been well taken, it was the duty of the court to have reversed the case on this point.

I have had prepared and will file in this case a certificate of the official reporter of the decisions of the supreme court of the State of Washington showing that this contention was made and urged. A copy of this certificate is printed in the back of the brief and marked Exhibit "A." I have done this in order to show that the late decision of the supreme court has reference entirely and alone to a waiver subsequent to the due day of a premium, and that the supreme court, in common with other courts, has held such a waiver clause of no effect where the parties by agreement had made New York the seat of the contract.

In the case of Griffith *vs.* New York Life Ins. Co., 101 Cal., p. 627, 113 Pac., 113, in the reported case in the Pacific Reporter, it appears that the contract was in all respects made in California. The application contained the provision that the place of contract was the State of New York, and the court held it a New York contract, and that the service of the statutory notice could not be waived. It says:

"The statute in question is regarded as indicative of the legislative will that, as a matter of public policy, life in-

surance companies should be deprived of the power to declare policies forfeited for non-payment of premium, except in the prescribed mode, and that being deprived of the power so to do, a waiver on the part of the insured cannot be construed to confer such power in the face of the law which has taken it away."

The supreme court of Texas, in the case of Insurance Company *vs.* Smith, 41 S. W., 680, having found enough in the contract to designate New York as the proper law, held against the validity of such a clause in the following language:

"Though a policy of life insurance was issued by a New York company to a citizen of Texas, *containing a provision to the effect that, if any of the premiums were not paid when due, the policy would become void, and that notice that each premium would be due at the date named in the policy was given by the policy, and that any other notice required by any statute was thereby expressly waived, the statute of New York enacted in 1876 (requiring notice to be mailed to the assured at least thirty days before the premium was due, in order to cause a forfeiture) applied, and a notice sent 15 days before the premium was due was insufficient.*"

Other courts have decided against the validity of a clause attempting to waive the statutes of the State of the agreed place of contract. In each of the following cases the contract was in a State different from the agreed place of contract, and in each there was inserted a clause in the policy attempting to waive the public-policy statutes of the States of the agreed place of contract. In the case of Insurance Co. *vs.* Pollard, 26 S. E., 421, the contract was made in the State of Virginia, between a resident of that State and an insurance company incorporated in Ohio. The statement of the facts and the ruling of the court appear sufficiently from the following quotation:

"The defendant company was an Ohio corporation doing business in this State where the insured lived, and where

the application was made. But for the express provision in the contract of insurance that it should be 'held and construed to have been made in the city of Cincinnati, Ohio,' there might be some ground for holding that it was a Virginia contract.

"Where, however, the parties to the contract have themselves expressly declared that their contract shall be held and construed as made with reference to a certain jurisdiction, that shows by what law they intended the transaction to be governed. And, as said by Phillimore (4 Int. Law, 469): 'It is always to be remembered that in obligations it is the will of the contracting parties, and not the law, which fixes the place of fulfillment—whether that place be fixed by express words or by tacit implication—as the place to the jurisdiction of which the contracting parties elected to submit themselves.' 'In every forum,' said Chief Justice Marshall in Wayman *vs.* Southard, 10 Wheat., 1, 48, 'a contract is governed by the law with reference to which it is made.'

"There is no room for inference or presumption as to what that intention was when it is expressed in the contract (Pritchard *vs.* Norton, 106 U. S., 124; 1 Sup. Ct., 102).

"The contract of insurance having been made with reference to the laws of the State of Ohio, the plaintiff had the right to rely upon them in enforcing his contract so far as they related to its validity, nature, interpretation, and effect."

"It is therefore as much a part of every contract of life insurance governed by the laws of the State of Ohio, and made after that statute was passed, as if incorporated in it; the general rule being that laws in existence are necessarily referred to in all contracts made under such laws, *and that no waiver of the particular stipulation in the contract can change the law* (Hermany *vs.* Association, 151 Pa. St., 17; 24 Atl., 1064; Ins. Ass'n *vs.* Ficklin, 74 Md., 172, 21 Atl., 680, and 23 Atl., 197; Ins. Co. *vs.* Leslie, 47 Ohio St., 409; 24 N. E., 1072; and White *vs.* Society, 163 Mass., 108; 39 N. E., 771)."

The supreme court of Georgia, in the case of Insurance Company *vs.* Hall, 23 S. E., 849, held that a provision in the contract that "It is further expressly agreed that the place of contract is the home office of the association in the city of Boston and this contract will be governed by and con-

strued only according to the laws of the State of Massachusetts," made the contract subject to the laws of Massachusetts. In that State there was a statute providing that no company should limit the time in which an action might be commenced to less than two years. The contract provided for a less period. Held, that—

"*The stipulation in the policy limiting the time within which suit may be commenced thereon to one year from the termination of the life of the member to whom it is issued, is void, and suit may be brought thereon at any time within the period allowed by the statute of limitations.*"

The circuit court of appeals of the sixth circuit, in the case of Penn Mutual Life Insurance Company *vs.* Savings Bank, 72 Fed. Rep., 413, had under consideration a contract made in the State of Tennessee between a resident of that State and an insurance company of Pennsylvania.

"*It was provided in the policy that the place of contract shall be the city of Philadelphia, State of Pennsylvania.*"

The court, speaking through Judge Taft, said:

"There can be no doubt that this policy is to be construed according to the laws of Pennsylvania."

The company insisted that the agreement of the parties made every answer by the insured to questions propounded to him in the application a warranty, and should be construed and held warranties, according to the agreement of the parties, notwithstanding the statute of the State of Pennsylvania to the effect that when a party warranted a statement to be true in an insurance contract it could not avail the insurance company as a defense, unless the statements were untrue and material to the risk. The court held that the agreement of the parties was in violation of the statute, and that it could not be avoided or waived by any such agreement.

To the same effect as the following:

"The Pennsylvania statute enacted that whenever the application for a policy of life insurance contains a clause of warranty of the truth of the answers therein contained, no misrepresentation or untrue statement in such application, made in good faith by the applicant shall effect a forfeiture. * * * *In other words, the statute is to be entirely overthrown and set aside, and the insurance company, under the guise of an agreement, is to acquire the power to accomplish the very result which the statute intended to prevent. Statutes would be very ineffective if they could be defeated in this way.* The operation of the rule does not depend on the agreement of these corporations to adopt it as a basis of their contracts, on the contrary, the rule prescribes the scope and effect of policies of insurance, and authoritatively determines the duties and obligations which arise from the contract. * * * The contract of insurance must be made in subordination of the statute, and must have the legal effect which the statute attributes to it, and none other."

Insurance Co. *vs.* Ficklin, 74 Md., 172.

VIII.

The omission of Mr. Hill to pay the premium does not prejudice respondent's rights.

In the Cohen case this court held that, if the law of New York controlled, the declarations of Mr. Cohen or his refusal to pay would not prejudice the rights of the beneficiary, Mrs. Cohen.

This court, in deciding this case on the former hearing, left open the question of whether or not the declarations of the insured would bind the beneficiaries in this language:

"Here, as in the last two cases, is disclosed a distinct agreement on the part of the insured and the company to waive and abandon the policy and all rights and obligations on the part of the parties thereto.

"But it is said that the insured was not the beneficiary his wife, and in case of her death, their children, being named as such; and that it was not in his power, by non-payment or waiver or abandonment, to relinquish or cancel her or their rights in the policy. *It is doubtless an interesting question how far the action of the insured can affect or bind the beneficiaries in a life-insurance policy.* If the answer in this case contained simply the allegation in respect to the insured's agreement with the company, we should be compelled to enter into an examination of that question; but it is alleged, not only that the insured and the company agreed to abandon the contract, but also that *the beneficiary, his wife, and the plaintiffs, their children, 'failed, neglected and refused' to pay the premium.*"

Were it not for the decision in the Cohen case the question might be claimed to be still an open one. This question was squarely presented in the Cohen case and as squarely decided. The allegations in the answer in the Cohen case were in these words:

"And the said Alexander Cohen, on the 11th day of June, 1892, paid one-half of the annual premium due on said policy for the year beginning on the 11th day of June, all premiums due before that time having been paid, *and thereafter wholly neglected, failed and refused to pay any other or further annual premiums, or any part thereof,* upon said policy, and that no payment whatever was made by or on behalf of said Alexander Cohen of any annual or semi-annual premium due upon said policy, but the same was by him suffered to lapse and become forfeited."

See record former hearing, Cohen case, p. —.

It will be observed that the allegations in reference to Mr. Cohen are fully as broad as the allegations of Sears and Allen which, this court held, made a defense, and more broad than the allegations of the Hill beneficiaries on the former hearing. In disposing of the contention that the declarations of Mr. Cohen were binding on Mrs. Cohen as her agent, the court says:

"There was no suggestion of rescission, abandonment, or knowledge by the beneficiary of the non-payment of the premium or any refusal or failure on her part in respect to the policy. * * * This notice (the one required by the notice law of New York) was not given. Hence, if the law of New York controls, the policy was still in force and the plaintiff was entitled to recover."

The record in this case is just as free from any suggestion of rescission, abandonment, or knowledge of the non-payment of the premium or a refusal or failure on the part of respondents in respect to the policy as the record was in the Cohen case in reference to Mrs. Cohen. In fact the record in this case affirmatively shows (over the objection of petitioner) that respondents, including the guardian, were not aware of the existence of the policy until after Mr. Hill's death. Petitioner does not claim that the respondents knew of the existence of the policy or the non-payment of any premiums upon it. It does not claim to have requested any one of them to pay the premium or that any one of them ever refused to pay the premium.

This being true, the question is certainly not an open one in this case. If the decision of the Cohen case is not the law of the case, it is certainly *stare decisis*.

Mr. Cohen was as much the agent of Mrs. Cohen as Mr. Hill was of Mrs. Cohen. But petitioner says the Hill children lived with Mr. Hill. It is fair to assume, the law conclusively presumes, that Mrs. Cohen lived with Mr. Cohen. Further than this, the record shows that Mr. Smith was the legally appointed guardian of respondents; hence the only one legally authorized to speak for them, and then only in a limited way. But even he was unaware of the non-payment of the premium. It will be remembered that petitioner argued at great length that Mr. Cohen's refusal to pay was Mrs. Cohen's refusal; that all he said or did was as the agent of Mrs. Cohen. The court held in the Sears case that Mr. Sears' refusal to pay would end the contract, he being the

beneficiary; so, if Mr. Cohen's declaration that he would not pay was binding on Mrs. Cohen, she could not have recovered, even though the policy was a New York contract.

IX.

The acts, declarations, statements, or agreements on the part of the insured cannot prevail against the beneficiaries in a policy of life insurance.

We do not think it necessary to discuss this question on its merits, for the reason already stated, that this court has decided this identical question in the Cohen case. It is also a rule of law so well settled it needs no argument on our part to sustain it. In fact we think the petitioner is in no position to urge it. In the Phinney brief, which is now on file at page —, it uses this language:

"This might not apply to cases where one has insured his life for another's benefit, for, as was said in Griffith *vs.* Life Ins. Co., (101 Cal., at page 638), 'the doctrine is well settled that where a valid policy is regularly delivered in pursuance of a consummated contract to one who has procured insurance upon his own life, *payable to another*, the insured cannot surrender the policy without the consent of the beneficiary.' But if the beneficiary is the insured himself, as in the present case, his right to surrender does not depend on the consent of any one else."

If that was good law then it ought to be good law now, even though its interest in the contention has changed. In its requested instructions it asked the court, among other things, to instruct the jury:

"Plaintiffs had the right, however by virtue of their interest in the policy to have paid any premium at the time it fell due, and the defendant would have been bound to accept it. It would have been the duty of the plaintiffs or

any of them to have made tender of the amount of the premium the time it fell due" (Record, p. 162).

This confesses the whole case on this point. Under the notice law no premium was (fell) due until thirty days after the service of the statutory notice on the insured or the assignee of the policy:

"Proof of payment was not essential to plaintiff's cause of action, because, under the statute referred to, the fact of non-payment alone is no bar to her action. Only when there is evidence of non-payment of premiums, coupled with proof of the service of the statutory notice required by said section of the insurance law, can the plaintiff's cause of action be defeated. It was not necessary for the plaintiff to plead or prove the latter fact: (1) Because the courts take judicial notice of public statutes, and therefore the provisions of the insurance law which apply to this policy must be treated as though they were incorporated into the policy which is made a part of the complaint; (2) because the plaintiff is not required to negative in anticipation a fact which it may be competent for the defendant to plead and prove as an affirmative defense. Does the proof of service of the statutory notice constitute an affirmative defense? The policy was valid until duly forfeited. It could not be forfeited until the statutory notice had been given, and the thirty days therein specified had elapsed without payment of the premiums then due."

Fischer *vs.* Ins. Co., 167 N. Y., 178; 60 N. E., 431.

"The notice must state that unless the premium shall be paid within thirty days after the mailing of the notice the policy will become void. The intention is obvious from the language, that the person insured shall have thirty days within which to make payment and save forfeiture after the mailing of the notice. The policy cannot be forfeited until the expiration of the thirty days after the mailing of such notice."

Hicks *vs.* Ins. Co. (3 C. C. A.), 60 Fed., 690–693.

"The only default on the part of the plaintiff was a failure to pay a part of the premium on the due day, and as

the defendant had never served the statutory notice, it was not in a position to work a forfeiture of the policy."

Strauss *vs.* Ins. Co., 63 N. E., 347; 170 N. Y., 349.

"There is no question of pleading involved. The plaintiff was not bound to allege or prove the payment of the annual premiums when due. The contract is to be read as if the act of 1876 had been literally incorporated into it. There could be no forfeiture for this cause unless the defendant alleged and proved non-payment after the due service of the notice required by law. * * * As the defendant was never in a position where it could insist upon a forfeiture, it becomes unnecessary to consider the question of the sufficiency of the notice served."

De Frace *vs.* Insurance Co., 136 N. Y., 144.

A mere reading of the adjudicated cases on this statute will clearly show that no premium is due, or legal right to pay is lost, until 30 days after the service of the statutory notice. No notice was ever served. So if the beneficiaries had the right to pay the premium as conceded by petitioners, that right was never lost and the policy was in full force at the time of Mr. Hill's death. When petitioner concedes the beneficiaries had the contractual right to pay, it concedes the whole case on this point. This is in entire accord with other decisions on this point.

The following are quotations from some of the decisions of the various courts and text works on this point:

"It is not quite true that a failure of the wife to pay the premiums from year to year as they became due will work this result. The statute unless waived in writing (the court should have said in writing, *in red ink*, on the face of the policy; see chapter 347, Laws of New York, 1879), provides that after the lapse of three years the reserve value of the policy, computed according to certain principles, is to be taken as a single premium of life insurance, at the published rates of the company, at the time the policy was issued, and must be applied either to continue the insurance of the policy in force at its full amount so long as such single premium will purchase temporary insurance of that amount at

the age of the insured at the time of lapse, or to the purchase upon the same life, at the same age, paid-up insurance payable at the same time, and under the same conditions, except as to the payment of premiums, as the original policy (chapter 347, Laws 1879). *And no policy can be declared or treated as lapsed or forfeited until 30 days after notice* to the policy-holder."

Stokes *vs.* Ammerman, 121 N. Y., 337.

"The party insured is not a party to the record, and therefore the declarations are not admissible on that ground. She is not a party in interest, as the whole benefit and interest inured to the assured. *She is not an agent and authorized to speak for him. Nor does she come within any other rule by which her declarations can be received against him.*"

Ins. Co. *vs.* Haney, 10 Kansas, 403, by Justice Brewer.

"The insured in such a case is not a party to the record, has no interest in the policy, *and, if he is to be considered as the agent of the beneficiary in procuring it, his agency ceases* with its issuance, so that there is no legal ground upon which his statements can be received."

Grangers' Ins. Co. *vs.* Brown, 57 Miss., 308, 315.

"The offer of the defendants to prove the statements of Fish, made in the fall of 1853, in relation to his intemperate habits, was properly overruled. Fish was not, after the issuing to the plaintiff of the policy in suit, a party in interest in that contract, and could make no statement or admission that would divest the rights of the plaintiff. *He was not in any manner the agent of the plaintiff, after the issuing of the policy, and so could not bind him.*"

Rawls *vs.* Ins. Co., 27 N. Y., 282, 290.

"The statements in question, then, are the declaration of a stranger, one who is neither a party to the suit, *nor was, at the time of making them, acting as the agent of a party.* * * * *They were not admissions against interest*, for they could injuriously affect only his wife's separate property."

Fraternal M. L. I. Co. *vs.* Applegate, 7 Ohio St., 279, 293, 298.

"In this case the insured reserved to himself no power of revocation or of changing the beneficiary. It is true that he entered into no obligation to continue to pay the *premiums;* but the omission to do this did not have the effect to give him an implied power of revocation. His mother herself might continue the payment of the premium. Moreover, by the terms of the policy, after payment of two annual premiums it would not lapse, and valuable rights would still exist under it. Under the circumstances the insured could not legally surrender the policy without his mother's consent, and her rights are not affected by such surrender. This seems to us to be the true rule, and it is supported by the weight of authority."

Pingry *vs.* Insurance Company, 144 Mass., 381.

"Assuming that by the policy John Lindemann was trustee for the children, it is insisted that the trust was revocable at the option of the trustee and was so far executory as to be capable of revocation; but I think it is a mistake to assume that the trust was wholly executory. It had been to a large extent executed. Every payment of premiums for 15 years had steadily added to the value of the policy as the property of the beneficiaries. The day of final payment grew nearer and the burden of premiums decreased steadily in number. Each payment made added to the surrender value and fully executed the gift to the extent of that value. What the insured had done for the benefit of the assured he could not undo without their consent, nor take from them what was already theirs and destroy the trust so far as executed."

Garner *vs.* Germania Life Ins. Co., 110 N. Y., 266; 18 N. E., 131, 132.

"To the same effect is Mr. May's text on the same question:

"'A life policy and the money to become due under it belong the moment it is issued to the beneficiary named in it, and the person procuring the insurance has no power by deed, assignment or will to surrender the policy and issue a new one, or by other act to transfer the interest to any one else. This right cannot be affected by any acts of the assured subsequent to the issue of the policy, except it be a breach of the condition. * * * No admissions of the assured

subsequently to the policy are admissible against the beneficiary.'"

May on Insurance, 3d ed., 399, L.

"While the beneficiary lives, no surrender of the policy without his consent, or non-payment of the premium after such surrender, will defeat his right. A surrender of the policy by the husband for the wife is ineffectual without her authority, * * * and although the policy may be forfeited for non-payment of premiums, yet non-payment of premiums after such an attempted wrongful surrender, without notice to the beneficiaries, will not forfeit the policy."

May on Insurance, 3d ed., sec. 399, P.

"And it is a general rule that a policy and the money that may become due under it belong the moment it is issued to the beneficiary named in it, and the person procuring the insurance has no power by deed, assignment or will to surrender the policy and issue a new one, or by other act to transfer to any other person the interest of the person named."

Wash. Bank *vs.* Hume, 128 U. S., 195, p. 207.
Glanz *vs.* Gloeckler, 104 Ill., 573.
Gould *vs.* Emerson, 99 Mass., 155.
Wilburn *vs.* Wilburn, 83 Ind., 55.
Ricker *vs.* Ins. Co., 27 Minn., 193.
Ins. Co. *vs.* Smith, 44 Ohio St., 146.
Garner *vs.* Ins. Co., 110 N. Y., 266.
Pitcher *vs.* Ins. Co., 33 La., 322.
Bacon on Ins., sec. 292.
May on Ins., sec. 399, P.
Ins. Co. *vs.* Wilke, 47 S. W., 544.

The insurance company claims that because the statute designates the party upon whose life the policy is written as the party upon whom the notice is to be served, he, for that reason, becomes the agent of all other parties interested in the policy, and his declaration of what he will do or will not do is binding upon them all, whether they are ignorant of his acts and declarations or not. We think we have fully answered that argument already. How does he become the

agent of such parties with such unlimited powers? Is there anything in the policy in this case that grants it to him? Is there anything in this record that in fact shows such power was granted to him by respondents? Is there anything in the notice law or any other law of New York that clothes him with any such power? The only authority they have for making any such claim is the fact, as above stated, that he is the party designated by the notice law as the one upon whom notice must be served. When the legislature enacted this law it found it necessary to designate some one of possibly very many interested persons upon whom this notice should be served. They could hardly require it to be served on everybody interested in a policy. So they designated the *insured in the first instance and, in case of an assignment in the second instance, the assignee. But in no event was the policy to be forfeited or declared forfeited until thirty days after the service of the notice and a failure to pay within the time limited therefor.* Let us see how this statute might and would work if their contention be correct, and the absurdity of the claim will at once be manifest. It is always presumed that a legislative body in enacting a law does it with a view to its practical operation on the subject-matter in hand, and always avoids having laws they enact work an absurdity.

Suppose Mrs. Hill had applied for the policy herself and paid the first premium out of her separate property, and died as she did before the second premium became due, leaving her minor children the beneficiaries, the owners of the policy, under the statute the company would still have been compelled to serve the notice on Mr. Hill. Yet who would maintain he was her agent for any purpose, even when alive. He could not be her agent after death. In such a case how could he become the agent of the children? Would not a court in such a case say he was simply the party designated by the statute upon whom the company should serve the notice, but never her agent for any other purpose? In such

a case who would contend that his neglect to pay or his flat refusal to pay would in any manner estop the children! The children in this case stand exactly in the same position as in the case suggested.

Suppose, again, a son of Mrs. Hill should have applied for a policy of insurance on his father's life, payable to his mother (a thing not at all uncommon), and paid the first and subsequent premiums upon it. The notice would still have to be served on Mr. Hill. Would any one say he was the agent for Mrs. Hill? Would Mr. Hill's declaration or flat refusal to pay bind either Mrs. Hill or the son, and end the policy without the service of the notice? Would not each have the contractual right to pay the premiums until they had done something or said something to preclude themselves from doing so?

Mrs. Hill would have at all times the contractual right to pay the premiums as long as the policy was in force, and under the statute that right did not cease until thirty days after the service of the notice.

The statute provides, as suggested, that the notice must be served upon the person whose life is insured, or the assignee of the policy if notice of the assignment has been given to the company. So in case of an assignment of the policy the notice must be served upon the assignee. Suppose Mrs. Hill had assigned this policy to secure a debt, leaving her a large equity in it, and notice of this assignment had been given to the company, then the notice should be served upon the assignee. The assignee in that case would be as much the agent of Mrs. Hill and the children, or Mr. Hill, the insured, as Mr. Hill was in this case. In such an event, would the declaration of statement of the assignee of the policy be binding upon the beneficiary, Mrs. Hill? Would his declaration that he would not pay the premium affect the contract as to Mrs. Hill? Would the declaration of the assignee of the policy that he would not pay the premium, or his omission to pay the premium, affect the policy as to Mr. Hill without the

service of the statutory notice? Is it not too clear for argument that in such a case the assignee is simply one of several parties interested in keeping the insurance alive, and as such is the party designated upon whom the statutory notice shall be served, and if served upon him then each and every party interested in keeping the policy alive must pay the premium within the thirty days limited by the New York statute? In a policy of this kind many persons are interested—the husband is interested in keeping the policy alive; the wife is interested in keeping the policy alive; the children and their guardian are interested in keeping the policy alive; possibly the mother or father of the beneficiary are interested in keeping the policy alive. The statute does not require that notice be served upon every one interested, but it arbitrarily designates one party interested as the person upon whom the notice must be served; and if served, every one interested in the policy must, at his or her peril, pay the premium within thirty days. But the right of these parties to pay the premium is not affected until the statutory notice is mailed and the thirty days have elapsed within which each one has a right to pay the premium. It may be that the assignee could estop himself or his executors from requiring the service of the statutory notice, but his act and declaration would only estop him; it would estop none of the remaining parties. Then when we speak of the insured or the assignee as the agent of the other parties for receiving the notice, we speak of him as an agent in the most limited sense. More properly speaking, he is simply the party designated by the statute upon whom the statutory notice must be served.

There are two cases cited petitioner from New York worth noticing. The first is that of Whitehead *vs.* Ins. Co., 102 N. Y., 143. The court had under consideration three policies, one denominated by the court as *a*. Speaking of it, the court says:

"These policies, therefore, at the moment of their execution, vested in the wife and children as the assured, under the provisions of the statute. Their interest was in the whole contract, and not merely from year to year, and so far only as it was executed (New York Life Ins. Co. *v.* Statham, 93 U. S., 24). They had the right, if the husband failed to pay the premiums, to pay them themselves, and so continue the policy in force. It is a necessary result of this ownership that the husband cannot, without the assent of the assured, surrender the policy to the company (Stilwell *v.* Mutual Life Ins. Co., 72 N. Y. 419; Bliss, Ins., sec. 348; Knickerbocker Life Ins. Co. *v.* Weitz, 99 Mass., 157;) Chapin *v.* Fellows, 36 Conn., 132. *His act in so doing is not, within the scope of the authority, inferable from his taking out the policy, and is repudiated, instead of ratified, by the claim of the insured founded upon it.*"

The court found that policy *a* was forfeited by non-payment of premium some five months before its surrender to the company.

The court says (page 153):

"Policy *a* in December, 1874, and five months before the attempted surrender, was forfeited by its terms on account of neglect to pay the annual premiums then falling due. While at the time such notice was not commanded by statute, it was required by and might be justly expected from the settled custom and habit of the insurer. In exact accord with that custom and habit it was given and if demand of the premium was needed, it amounted to such demand."

In the other two policies no notice was given and the policies were not forfeited when the surrender occurred. The notice mentioned in the following extract was evidently the statutory notice. But the company insisted that several annual premiums thereafter fell due and were not paid. Among the answers the court gave to this suggestion was that no subsequent premium notice was given. This all appears from the discussions in this case and the Frank case, which we will directly call to the court's attention. Speaking of these two policies, the court uses this language:

"The situation as to the other two policies is different in the very important particular that neither of them were forfeited when the surrender took place; and the failure to pay annual premiums occurred thereafter. As to these omissions, two things happened which, by possibility, may have prevented such payments by the assured, and for which the insurer was accountable. *No notices were sent either to the insured or to the children*, and the company, by the wrongful possession and cancellation of the policies, and by their agreement of surrender, did an act, the tendency and purpose of which was to prevent future payment by the parties interested. If the company had refused to buy in the policies of the insured, except with the consent of the insured, one of two things would certainly have taken place: either in view of their father's embarrassment, the children would have consented to the surrender, taking as their own the surrender value which belonged to them, or they would have kept the policies in life by themselves paying the premiums. More than that was the interest of the assured, and greater than that their loss by the unauthorized act. They can only obtain full redress by a recovery of the amount insured, less the unpaid premiums and interest."

That the notice mentioned in the Whitehead case was the statutory notice more clearly appears in the case of Frank *vs.* The Mutual Life Ins. Co., reported in the same volume (102 N. Y., 278), decided the same term, and argued by Mr. Davies, who is on the brief of petitioner here. The court says:

"It is in this respect (in the case the court is deciding, the insurance company had sent the statutory notice) that the present case differs decisively from Whitehead *v.* New York Life Insurance Company, *ante*, 143, recently decided. In that case we held that the non-payment of the premiums, after the surrender of the policy was occasioned in part by the wrongful act of the company in accepting a surrender from one having no authority to represent the assured, and that the insurance company participated with the husband in keeping his wife and children in ignorance of their rights. In the present case, accepting the surrender was not, as we

have said, a wrong to the plaintiff; nor was she in any manner kept in ignorance of her rights, or prevented by any act of the company from continuing her payments; *nor had the company in the case last cited (Whitehead case) given to the assured the notice required by the act of* 1876 and which was essential to *entitle it to terminate the policy.*"

Further on the court used this language:

"The exception taken by defendant Demond to the exclusion of evidence that in August, 1876, when he paid the premium due July 21, 1876, the secretaay of the insurance Co. informed him that the policy had lapsed, but, that if he, Demond, would pay the premium already due, the company would revive it for his benefit alone, was not in our judgment well taken. * * * *But there was no proof that it had been forfeited at that time, as it does not appear that* 30 *days' notice required by chapt.* 341 *the Laws of* 1876 *had then been given.*"

So it will be seen that, instead of the Whitehead case being an authority against us, it is with us. That case, together with the Frank case, clearly show that it was the opinion of the court of appeals of New York that where a wife and children were ignorant of the existence of a policy their right in it could not be terminated except by service of the notice.

These cases are in entire accord with Stokes *vs.* Ammerman:

"*It is not quite true that the failure of the wife to pay the premiums from year to year, as they become due, will work this result (forfeiture)* * * * *And no policy can be treated as lapsed or forfeited until* 30 *days after the notice to the policy-holder.*"

The case of Schneider *vs.* Ins. Co., 123 N. Y., 109, cited by petitioner, does not support its claim. In that case the statutory notice was served and the wife failed to pay within thirty days. This is shown in the opinion of the court. It says:

"On the 15th day of March, 1886, defendant duly served the notice required by the statute that another premium

would fall due on the 17th of April following. This notice was served upon the husband who had the policy in his possession, and who was the agent of the wife for the purpose of receiving the notice (Laws of 1877, chap. 321). This premium was not paid and no notice was thereafter served by defendant. * * *

"The premium due on the 17th day of April, 1886, was not paid. The notice required by the statute was served on the 15th of March preceding, and the existence of the policy as a valid contract of insurance, and liability of the defendant thereon, depended upon the performance of the condition. The fraudulent surrender of the policy by the husband before the April premium became due in no way excuses the failure to pay the premium, unless the defendant was in some way connected with that fraud, or guilty of some negligent act in regard thereto."

The court held that company, having served the statutory notice, was not guilty of any negligent act; that it had done all that was required by the notice law and could insist on a forfeiture.

The case of Holmes *vs.* Gilman, cited by petitioner, has no bearing. That was a case where the husband procured a policy payable to his wife. He paid all the premiums from trust funds. The controversy was between the wife and the *cestui que trust* as to who should recover the proceeds of the policy. The court held that the husband could not purchase a policy for his wife, pay the premiums out of trust funds, and the wife hold the proceeds against the *cestui que trust*. The use of the word *agent* must be considered in the light of those facts.

X.

An infant cannot appoint an agent. Certainly one does not become an agent of an infant because he lives in the same house with him.

We do not think it necessary to discuss this point. The contention of defendant that Mr. Hill became the agent of these respondents because they lived with him surely needs no answer. Of course, Mr. Hill might procure insurance for them on his life. In that limited sense he might be and frequently is mentioned as their agent in doing so—that is to say, his act is regarded as being done for them; but that would give him no authority over the contract after it was made. The only person who can act for an infant so as to bind him or his property is the lawfully appointed guardian by a court having jurisdiction of the property and person of the infant, and he may only act in accordance with the law under which he is appointed under the order and approval of the court appointing him.

Mr. Mechem, in his work on Agency, section 51, says:

"It has been the settled doctrine of the law that an infant cannot empower an agent to act for him. The reason on which this rule depends has been well stated. The constituting of an attorney by one whose acts in their nature are voidable is repugnant and impossible, for it is imparting a right which the principal does not possess,—that of doing valid acts. If the acts when done by the attorney remain voidable at the option of the infant, then he has done through the agency of another what he could not have done directly—binding acts. Such personal and discretionary legal capacity as an infant is vested with is, therefore, in its nature, incapable of delegation.

"But if the consideration suggested as the foundation of this rule be not satisfactory, the rule is well established by a conclusive weight of authority."

Mr. Story in his work on Agency, section 6, says an infant is *wholly incapable* of appointing an agent.

The rule is well established that an infant may make a contract and affirm or disaffirm it on coming of age, but that an attempt to appoint an agent is not voidable, but wholly void. (See citations in Mechem on Agency, sec. 51.)

XI.

The doctrine of laches does not apply to an infant.

The supreme court of Pennsylvania says:

"The defense of the plaintiffs' laches is untenable. They were minors at the time of the transaction and no laches can be imputed to them until after their arrival of age. After that period they had 21 years to assert their rights."

Spencer *vs.* Jennings, 139 Pa., 198.

"Laches are not to be attributable to an infant (Dragoo *vs.* Dragoo, 50 Mich., 575). The law assumes that complainant was ignorant of her rights during her minority, nor can the neglect of her mother to act for her deprive her of any right under the statute."

Putnam *vs.* Tinkler, 83 Mich., 628.

"It is a maxim of law that laches or neglect is imputable to an infant *durante minoritate*, because he is not supposed to be cognizant of his rights nor capable of enforcing them. The staleness of demand or transaction is no prejudice if infancy occur; and no presumption is indulged against an infant by lapse of time."

Tyler on Infancy, 2d ed., p. 167.

Neither is laches imputable to one ignorant of their rights. Mr. Wood says:

"But a person who has not complete knowledge of the facts cannot be said to acquiesce, and I do not see, say Turner, J., how a man can be said to have acquiesced in that he does not know; and in cases of this sort I think

that acquiescence implies full knowledge, for I take the rule to be quite settled that a *cestui que trust* cannot be bound by acquiescence, unless he has been fully informed of his rights and all material facts and circumstances of the case."

Wood on Limitations, 1st ed., sec. 61.

XII.

One cannot enforce an estoppel against a minor.

This rule does not need argument to support it.

This court, in the case of Sims *vs.* Everhardt, 102 U. S., 300, uses this language:

"The question is, whether the acts and declarations of an infant, during infancy, can estop him from asserting the invalidity of his deed after he has attained majority. In regard to this there can be no doubt, founded either upon reason or authority. Without spending time to look at the reason, the authorities are all one way. An *estoppel in pais* is not applicable to infants, and a fraudulent representation of capacity cannot be equivalent for actual capacity. A conveyance by an infant is an assertion of his right to convey. A contemporaneous declaration of his right or his age adds nothing to what is implied in his deed. An assertion of estoppel against him is but a claim that he has asserted or contracted. But he can no more do that effectively than he can make the contract alleged to be confirmed."

To same effect see Field on Infants, sec. 17.

XIII.

The contention that this company is a mutual one, and that one construction of the statute must be given it for that reason and a different one apply to a stock company is untenable.

The statute says no life insurance company doing business, etc., shall forfeit a contract except on prescribed conditions.

There is certainly nothing in the statute suggestive that it was intended to apply to one class of old-line life insurance companies and not to another. Before a court would hold that a statute of this character would be enforced to its full intent and meaning against a joint stock insurance company and not against what petitioners call this, a mutual insurance company, it must find its justification in some language of the act. We can find nothing of that kind in the statute under consideration, nor can we see any reason for such a distinction. It is common knowledge that all the large companies operate on the same plane. In theory at least, the policy-holders all participate in the profits. The Equitable Insuranse Company has $100,000 paid up stock, yet it may only pay to its stockholders 7 per cent. per annum dividends. The charter under which it operates requires the balance of the profits to be distributed among its policyholders. What is true of it is largely true of every other like insurance corporation in which stock is held by individuals. It is also common knowledge that the great majority of insurance is written by corporations that are equally mutual insurance companies with this one. There is no reason why the statute should apply against the one corporation and not the other. The rights under a contract issued by a corporation to one a stockholder must be

construed and enforced just the same as with one not a stockholder.

A stockholder in a contract between himself and the corporation ordinarily cannot claim any special privilege or exemption on his contract simply because he is a stockholder. A stockholder in a bank that becomes insolvent may have a large deposit in the bank and may have put it there for the purpose of keeping it solvent without any legal duty to do so, yet his rights are exactly those of any other depositor. A policy-holder in an insurance company may make a contract with it to build a building; his contract is construed just the same as it would were he not a policy-holder and would not share in the profits of the company. A policy of insurance with an insurance company, where the policy-holder shares in the profits, is construed exactly as it would be with a company where he does not share in them. We know of no case where any distinction has been made; a breach of warranty would be the same in either case; a failure to pay a premium would be the same in each case. In construing such a contract courts do not stop to inquire whether or not a policy-holder is sharing in the profits. As to the contract, each is supposed to deal at arms' length. Each has a right to obtain the very best contract, the most favorable contract possible. In such a contract either party has a right to require of the other a strict fulfillment of the contract according to its terms, subject to the law controlling it. The fact he may or may not be a sharer in the profits does not change the law applicable to it unless the law clearly so provides.

XIV.

The contention of petitioner that the statute would not keep a policy alive after more than one default, or that it only applies to residents of New York, is contrary to the true meaning of the law and the adjudicated cases, including that of this court in the Cohen case.

The petitioner contends now, as it did when this case was here before, that the statute only applied to one default and only applied to residents of New York who had a post-office address in New York, regardless of when the contract was made. It also urged that the petitioner was a mutual insurance company, and that a party could not enforce a contract against the corporation, and consequently against other policy-holders, unless he first showed he had paid the stipulated premiums. This same point was urged at great length in the Cohen case. The decision in the Cohen case holds flatly against this contention. In the statement of the case Justice Brewer uses this language:

"On June 10, 1885, the petitioner delivered to Alexander Cohen, in the State of Montana, a life-insurance policy for $3,000, conditioned upon the annual payment of a premium of $89.61. Upon it the insured paid premiums up to and including June 10, 1892. No subsequent premiums were paid. On Sept. 21, 1897, he died. His wife, Tine Cohen, was the beneficiary named in the policy."

This court thus calls attention to the fact, clearly and explicitly, that in the Cohen case five and one-half years had elapsed after the premiums were alleged to be due under the terms of the policy, or, as contended by petitioner in that case, there were eleven semi-annual defaults made. The first alleged default was two years longer than in this case.

In the Cohen case the first default was June, 1892. Cohen died September, 1897, almost five and a half years later. In the Hill case the first alleged default was April, 1887. Hill died December, 1890, or about three and a half years later.

Keeping this in mind, this court in the Cohen case said:

"The single defense was the non-payment of premiums after June 11, 1892. There was no suggestion of rescission, abandonment, knowledge by the beneficiary of the non-payment of the premium, or any refusal or failure on her part in respect to the policy. * * * This notice (the one required by the New York law) was not given. Hence, if the law of New York controls the policy was in force and the plaintiff entitled to recover. The question therefore is whether the law of New York controls."

The contention there, as here, was that, even if the law of New York controlled, Mrs. Cohen could not recover, because the demurrer admitted that the premiums had not been paid for over five years; but the court overrules that contention and says there being "no suggestion of rescission, abandonment, or knowledge by the beneficiary of the non-payment of the premium" (just the case here), if the law of New York controls, the beneficiary was entitled to recover. So the defense here, that the premiums were not paid for over three years, is not well taken. If the decision in the Cohen case (it being argued at the same time and in the same brief with this) if not the law of the case, it is *stare decisis*. If Mrs. Cohen should recover in that case, if the law of New York controlled, the Hill beneficiaries should in this case, as we have demonstrated the law of New York does control.

If this was not a closed question the result would be the same. The fact, if it be a fact, that this company is a mutual life insurance corporation, we think, cannot change the rule that a policy issued by it is not forfeited until the statutory notice is served, or the parties by mutual agreement end the contract. This may be by agreement or by conduct presupposing such an agreement. In this case it is admitted that

contract was not ended by the company sending the statutory notice, and a failure to pay thereafter. *It was not forfeited.* In this case there is no contention it was ended by the mutual agreement of the parties. There is no contention that the respondents ever said or did anything that estopped them from enforcing the contract. It is admitted that respondents did not know of the non-payment of the premium; in fact, it affirmatively appears that they did not know of the existence of the policy. They could not abandon a policy which they did not know was in existence. They did nothing, said nothing, which closes their mouths from speaking the truth or insisting on any right in the contract. On the other hand, the company knew of their vested right in the policy. It knew that their interest in the policy could not be ended without either service of the statutory notice and a failure to pay thereafter, as provided by the statute, or by an agreement with them to end the policy, or by conduct on their part amounting to that after knowledge of their rights and duty in the premises. This court clearly held in the Cohen case, as we have shown, that a mere omission to pay the premium by the beneficiary, especially where she was unaware of the non-payment of it, would not cut off her rights. The statute reads this way:

"No life insurance company doing business in the State of New York shall have power to declare lapsed or forfeited any policy hereafter issued or renewed by reason of non-payment of any annual premium or interest, or any portion thereof, except as hereinafter provided. * * * In case payment demanded by such notice shall be made within 30 days limited therefore *shall be taken in full compliance with the requirements in respect to the payment of said premium or interest*, ANYTHING THEREIN (the policy) TO THE CONTRARY NOTWITHSTANDING. *But no such policy shall in any case be forfeited or declared forfeited or lapsed until the expiration of 30 days after the mailing of such notice.*"

The simple reading of the statute is a complete answer to petitioner's argument that it was the duty of insured to pay

before the service of the statutory notice. No language could be plainer. The forfeiture is made entirely dependent upon the service of the notice. Under it the company could secure the payment of the premium or forfeiture of the policy within thirty days at any time it saw fit to demand the premium in pursuance of the statute. It was not helpless under the statute. Its rights were well defined. Did it ever undertake to end the contract in accordance with the statute? It admits that it did not. Whose fault is it that it did not get the premium or obtain the right to declare the policy forfeited? Certainly the fault of no one but itself. Did the respondents say anything to it that prevented it from serving the notice? It makes no such claim. Were they aware that the company was claiming a forfeiture? The contrary is the undisputed evidence in the case.

The authorities are all of one accord that under such circumstances the contract continues as a valid and existing contract until after the service of the notice, as the following extracts from adjudicated cases will show:

"The effect of the statute was that, after a policy had once been issued, *no act of the insured by way of omission to pay the premium could of itself work a forfeiture of the policy.* So far as it was concerned, the contract was a permanent one until some act of the defendant had been done by way of putting an end to it. Therefore, when any one entitled to sue upon it had occasion to bring an action, he was not compelled, as a condition of making out his cause of action, to show that the payment of the premiums had continued after the policy had once taken effect, because by the express terms of the statute, *the policy remained a valid instrument between the parties until, after a default in the payment of the premiums, the company had served the notice and taken certain action which was prescribed by this statute.* As was said by the court of appeals in Baxter *v.* Insurance Co., 119 N. Y., 450, 455, 23 N. E., 1048, the contract is not impaired by a failure to pay the premiums on the day fixed, but by a failure to pay within 30 days after the statutory notice had been served. The statute prescribes this notice as a necessary condition of forfeiture, and, unless it was served, the insured was not in

default, because payment within 30 days after the notice is to be taken as a full compliance with conditions.

"Before the defendant could raise any question in regard to the non-payment of the premium, it was necessary to show that it had complied with the statute by serving the notice, as this step was essential to put the insured in default or to raise any point based on his omission to pay the premium.

"No one would claim that it was not necessary to allege in this affirmative defense that there had been a failure to pay the premiums. But a failure to pay the premium is no more necessary to constitute the forfeiture than the service of the notice; and if it was necessary to allege one, it just as clearly was necessary to allege the other. Under the rule laid down in the case last above cited, the affirmative defense must have been set up before the defendant could have any benefit from it. It was not sufficient to set it up in part, but it must be fully set out in the answer, so that the plaintiff might know precisely what was claimed to constitute a forfeiture. All that she was notified of by this answer was that her husband had not paid the premium. Looking at the statute, she must have known, of course, that that was entirely insufficient to warrant the forfeiture of the policy, and she was entitled to stand upon that insufficiency, in the absence of any allegation that the notice had been served, which put upon him the duty of paying it within thirty days. Indeed, the allegation of notice was the much more important of the two, because that was the transaction which put Wilhelm Fischer in default, and of which, in the nature of things, this plaintiff could have had no knowledge or any intimation of its existence unless it was set out in the answer."

Fischer *vs.* Ins. Co., 56 N. Y. S., 260.

This case was affirmed on appeal, the court saying:

"Proof of payment was not essential to plaintiff's cause of action, because under the statute referred to the fact of non-payment alone is no bar to her action. Only when there is evidence of non-payment of premium, coupled with proof of service of the notice required by said section of the law, can plaintiff's action be defeated (Fischer *vs.* Ins. Co., 167 N. Y., 178).

"It was not necessary, in order to enable the plaintiff to recover the sum insured, to pay or tender before action the premium that was payable on the 24th day of August prior to the death of insured. If the policy was in full force when the assured died, as we think it was, that event fixed the liability and obligation of the defendant, notwithstanding the omission to make that payment. Nothing remained to be done by the widow of the insured, or her assignee, except to present to the defendant the proofs of death required by the policy. The death of the assured terminated the contract. The defendant's promise to pay, if it was not discharged, had matured, and the person entitled to the benefits of the policy had only to establish the facts of death within the time and in the manner prescribed therein. The contract was kept in life, by force of the statute, until the contingency upon which payment depended occurred. The death of the assured created the relation of debtor and creditor between the defendant and his widow, and the unpaid premium, with interest from the date when payable, was a claim to be deducted by the defendant from the sum due upon the policy. This put the defendant in precisely the same position in which it would have been if the premium had been duly paid (Carter *vs.* John Hancock M. Life Ins. Co., *supra*). It was conceded upon the argument in this case that the unpaid premium, and interest thereon, was deducted from the verdict, and thus no injustice has been done."

Baxter *vs.* Ins. Co., 119 N. Y., 450.

"There is no question of pleading involved. The plaintiff was not bound to allege or prove the payment of the annual premiums when due. The contract is to be read as if the act of 1876 had been literally incorporated into it. There could be no forfeiture for this cause unless the defendant alleged and proved non-payment after the due service of the notice required by law. * * * *As the defendant was never in a position where it could insist upon a forfeiture, it becomes unnecessary to consider the question of the sufficiency of the notice served.*"

De Frace *vs.* Insurance Co., 136 N. Y., 144, p. 151.

"The only default on the part of the plaintiff was a failure to pay a part of the premium on the due day, and as the

defendant had never served the statutory notice it was not in a position to work a forfeiture of the policy."

Strauss *vs.* Ins. Co., N. Y., 63 N. E., 347.

The Strauss case was decided since the case was here. In it notice was served on the insured, but not upon the assignee of the policy. In it, it will be remembered, the note given in payment of the premium in question contained a clause specifically and expressly waiving the service of the statutory notice. This note was given in payment of a premium overdue. (See decision of lower court, 67 N. Y. S., 509.)

XV.

The legislature of New York had the power and did provide that no policy of insurance should be forfeited without the prescribed 30-days notice.

No one can read the decisions heretofore cited and quoted from New York without coming to the conclusion that the highest courts of that State have held the law in question prohibited the forfeiture of an insurance policy in that State without the service of the statutory notice. This being true, those decisions are binding on this court, unless the act in question is unconstitutional. Even then no error is assigned on that ground. In fact, no one will contend that the legislature of New York had not the power to make the forfeiture of any policy conditioned solely on the service of such a notice and provide that the policy would be a continuing one until such notice was served.

Every member of a mutual life insurance company when he becomes a policy-holder enters into an agreement and understanding, if not actual, at least implied, that the corporation itself will make other contracts with other people along the same general line. He consents and agrees in law that the corporation, acting by its officers,

shall make valid and existing contracts with such anticipated policy-holders. He trusts to the officers of the corporation to make valid and profitable contracts. Such policy-holder gets the benefit of contracts thus made. While getting the benefit of contracts so made he must stand his share of the burden of such contracts. He must share in the losses incident to the business, as well as share in the profits. As a policy-holder he has a right to insist upon the company enforcing the provisions of a contract in favor of the corporation. As a policy-holder he has no right, unless the contract be *ultra vires*, to ask a court to ignore the provisions of a new contract favorable to the new policy-holder. As a member of the corporation he can ask nothing further than that the corporation live up to the contracts it makes with other policy-holders, and demand of each other policy-holder that they live up to the provisions of the contract. No one will contend that a legislature that grants to a corporation of this kind a charter enabling it to write life insurance might not insert in such charter a provision to the effect that no policy could be forfeited until it served a prescribed notice in a prescribed way. In such case each policy-holder contracts with the corporation with the understanding that his policy and any other policy it might write would be subject to the provisions of the charter and would not be forfeitable except by the officers of the corporation complying with such provision. Every party who contracts with a corporation of this kind does it with the knowledge and understanding that a legislature may require of such a life insurance corporation, as a condition of forfeiture, the service of such a notice, and that if the legislature chooses to enact such a law no contract will be forfeitable unless notice is served.

No policy-holder has a right to demand in such a case that the policy of another member of the association shall be forfeited in any other manner than provided by such an act. Each policy-holder has the protection of such legis-

lation. Each policy-holder may claim it and rely upon it, and no policy-holder has the right to ask of another policy-holder to surrender a right that each may demand and claim. Take the strictly mutual benefit associations, for example, where the trustees or officers are compelled to make assessments to pay death losses. So far as I am aware, in every instance, by the laws controlling the organization, a notice is required to be served on each member. It has never been claimed, so far as I am aware, that a member loses his policy unless he has first been served with a notice stating the amount of the assessment. No member of such an association has a right to ask that a policy of a member cease until the requisite notice is served, and if the officers of the association fail and neglect to perform their duties, then the association itself must suffer the loss, because the agreement is mutual and based on the agreement and understanding that no one shall lose his membership or his insurance except on the condition of the service of the prescribed notice.

I have never known of a policy-holder who was worried for fear that an insurance company which had issued to him a policy would not forfeit enough of the contracts of his brother policy-holders. The suggestion that there might be such a one is something new and novel. I have never heard any one suggest that a company did not insert in its policy a sufficient number of harsh forfeiture provisions and did not enforce them with sufficient promptness.

If the officers of the association fail to demand and secure the payment of a premium from a policy-holder, such as a statute or by-law of the association requires, the complaint must be made against the officers of the association, not the member. Each member looks to his contract and the by-laws, or, in case of some controlling statute, to the statute as defining his rights; no member loses any right in his contract of insurance as long as he pays his dues in entire accordance with the contract, the by-laws, and statute con-

trolling. No member may complain of another so long as he pays all premiums legally required of him. No one is in default as long as he pays his premiums in entire accord with his contract and a controlling statute. No one has a right to ask a member to lose his contract until he can show he has violated it. If a notice is a condition precedent to a forfeiture, no policy-holder is in default until it is served.

The notice law of New York is not harsh nor unusual. Similar laws have been enacted in a number of States to protect the policy-holders. Nearly all of the courts that have been called upon to pass upon such laws have spoken of them with favor. The notice law of New York does not prevent the company from forfeiting a contract on the day stipulated for the premiums to be paid, but provides easy and simple methods of terminating insurance contracts unless the premiums are paid. This case is not at all similar to the Statham case, where each party was prevented from living up to the terms of the contract by war. In that case no question of notice was involved, but I feel certain that if the life insurance company interested in that case had been required to serve a notice of forfeiture as a condition of forfeiture of the contract, and then, the war intervening, not being able to serve their notice, they would have been compelled to suffer instead of the policy-holders, but the contract in those cases required the insured to pay the premiums on the day served, and if not paid on that day the policy was to be forfeited. The court held that, while it was true they could not pay, still the burden was upon them to pay, and the contract ceased. Again, in this case, the corporation is defending. No policy-holder has intervened and asked to be protected in this case, but the issue is here between the corporation itself and the plaintiff. The corporation is defending as any other corporation would defend. The policy-holders themselves are making no defense nor asking to intervene in their own behalf.

XVI.

Law of the Case.

On the second hearing the circuit court of appeals used this language:

"The decision of this court on all other points (points other than the alleged but unproved abandonment) not having been criticized or reversed is now the law of the case for this court."

We have no doubt but that the above rule is correct in law. It certainly ought to be the law and the practice. If we are right in saying it ought to be the law, this court will so declare it. The circuit court of appeals being established for the sole purpose of finally deciding specified classes of controversies (this is of one class), it certainly must follow its own decisions in all cases except where it is subsequently reversed by this court. If it would have other people respect its decisions or be controlled by them, it must respect and be controlled by them itself until such time as this court announces a different rule.

It is well established that the decision of a circuit court of appeals on a first appeal is the law of the case on a second hearing, providing it has not been removed to this court by a writ of certiorari or otherwise. The different circuit courts of appeals have so held in the cases of Matthews *vs.* Bunk, 100 Fed., 307; R. R. Co. *vs.* Carroll, 84 Fed., 772; Supreme Lodge *vs.* Lloyd, 107 Fed., 70; Cable *vs.* Ins. Co., 111 Fed., 19. Many other cases might be cited.

That these decisions are correct we have the authority of this court in the case of Panama R. R. Co. *vs.* Napier Shipping Co., 166 U. S., 28044; law ed., 1004.

"It is claimed that, upon this hearing, we are limited to the question of damages, for the reason that the writ of certiorari was issued after the decrees of the district and circuit

courts, dismissing the libel upon the merits, had been reversed, the case remanded to the circuit court to assess the damages, a final decree of the circuit court for $38,861.86, and a second appeal to the court of appeals, which had pronounced an opinion affirming the decree of the circuit court, although no formal decree seems to have been entered at the time the writ of certiorari was issued. * * *

"If, under such circumstances, this court were powerless to examine the whole case upon certiorari, we should then be compelled to issue it before final decree, whereas, as was recently said in the case of the Conqueror (*ante* 514), it is and generally should be issued only after a final decree. * * * *But while the court of appeals may have been limited on the second appeal to questions arising upon the amount of damages, no such limitation applies to this court, when, in the exercise of its supervisory jurisdiction, it issues a writ of certiorari* to bring up the whole record. Upon such writ the entire case is before us for examination."

To the same effect is Smith *vs.* Vulcan Iron Works, 165 U. S., 518–541, law ed., 810:

"In the second case, it was argued, in support of the petition for a writ of certiorari, that the circuit court, upon receiving the mandate of the circuit court of appeals directing a dismissal of the bill, erred in entering a final decree accordingly without further hearing; and that the circuit court of appeals erred in dismissing an appeal from that decree. But the rule to show cause did not proceed upon that ground. And the merits of the case having been once determined by the appellate court in reversing the interlocutory decree, were not open to reconsideration at a later stage of the same case, either in that court or in the court below."

This court held in the Panama case, just cited, that while the decision of the circuit court of appeals was binding on it on the second appeal, yet its first decision, and consequently second decision, was not binding on this court. This for the reason, clearly stated, that until after the second hearing (the first decision not being a final one) this court had no opportunity to examine the decision on the first hearing,

because it would not issue its writ of certiorari until a final decision of the case. But that is a very different state of facts from this. This case was here once before, and this court had full opportunity and, as we think, duty to decide every point in the case wherein it differed from the circuit court of appeals. This court issued the writ presumptively for the sole purpose of settling important questions in the case, to revise the decision of the circuit court of appeals in so far as it needed revision to correctly state the law.

The rule, then, is established that the decision of a circuit court of appeals is the law of the case on a second hearing when it has not been removed here on writ of certiorari.

Would the rule be changed when the case had been removed here by writ of certiorari as to those points it did not decide and upon which it expressed no opinion? We think not. If not, the first ruling of the circuit court of appeals would control it on the second hearing. Yet certainly its former ruling would not bind it to one course and leave another course open to this court. That which controls the one court on a second hearing certainly controls the other. Then let us see if, on reason or authority, the circuit court of appeals in the second appeal is bound by its decision as to the first on points not reversed by this court.

As we have said, the law establishing the circuit court of appeals made it a court of last resort. Its whole duty is to review decisions of lower courts. After a decision once made in a case and its mandate issued, it is powerless to review its own decision. Its decision may be reviewed by this court, and, in so far as this court overrules it, the decision of this court to that extent abrogates and supersedes that of the circuit court of appeals, but, we think, no further. The decision of this court does not change the fact that what remains of the decision of the circuit court of appeals is a decision of an appellate court controlling on the circuit court. Where this court exercises its supervisory power by use of the writ of certiorari, it certainly takes the decision of the

circuit court of appeals, much like it does a decree in chancery on appeal, to modify it and correct it, if necessary, so that the case may be finally ended upon the second trial, if anything remains to be tried.

An announced rule by the circuit court of appeals is binding upon it as *stare decisis* until this court has announced a different rule. Any point decided in the Hill case would be binding on it in another case until this court, in the same case or different case, had reversed it on the particular point. Parties entering into contracts, attorneys advising clients on contracts already entered into within the territory reached by a circuit court of appeals, have a right to rely on the decision of their circuit court of appeals as controlling, as much so as they have upon the decision of the highest court of their State (with the exception noted), which by the law of the land is made the final arbiter of any controversy arising over their contract. Any other rule would make the decision of such courts a snare and delusion.

Of course if the case had never been before this court, as in the case of Panama R. R. Co. *vs.* Shipping Co., *supra*, the decision of the circuit court of appeals would be binding thereafter only on it and the lower court on the second trial.

When this court on the former hearing of this case had this matter before it, it decided it in view of the decisions already made and in view of the course the litigation would take in the future. It decided it knowing that neither party would in the future have a right of further review here unless the lower court should refuse to carry out its mandate. It knew the lower court would necessarily first look to the decision of this court to see what this court decided as binding upon it. It would then necessarily look to the next highest decision, that of the circuit court of appeals, to see what it had decided, and which had not been criticised or reversed by this court. It certainly could not disregard the decision of the circuit court of appeals on such points. It would have no right to assume that this court expected it to

ignore the decision of the circuit court of appeals on unreversed points; yet that would be exactly the result if it failed to follow that court on such points. This is strengthened by the fact that the circuit court of appeals in case of appeal would be the next and presumptively the final court to review its action.

If this court would reasonably expect the lower court to so regard the decision of this court, then it amounted to a command by this court to do so, and it committed no error in so acting. What other course could it take within reason or in regard to proper administration of the law? What other view would be compatible with common sense or duty? It could not ignore the court of appeals on questions it had deliberately decided and which this court did not reverse. As we have said, that court was established solely for the purpose of reviewing decisions of the different circuit and district courts. If its unreversed decisions are not binding on such lower court, it is worse than a useless and very expensive machine. This court also decided this case necessarily with a view to how the circuit court of appeals would construe its decision when again required to do so, in order that it might correctly decide the case. It must review the whole case—this court's decision together with its former decision—in the light of what this court in reason and in the orderly administration of the law would expect it to do. This court decided the case in view of what already had been decided, and in view of the construction of its opinion that intelligent jurists would place upon it who were called by law to give it effect and force. This court would act on the theory that its decision would be construed in the light of the law establishing the circuit court of appeals, clothing it with all the dignity and power and giving its decision all the force and effect of an appellate tribunal, with a supervisory control only in itself. It certainly would not assume that the circuit court of appeals would not follow its former ruling on a point that this

court had failed to suggest as error. It certainly would expect the circuit court of appeals to do the natural thing, to do the thing which in all fairness it ought to do—follow its own conclusions, reached after care and deliberation, and which this court did not deem of enough importance to suggest as error or even an important question. For illustration, the petitioner in the circuit court of appeals, and were urged with great persistency that respondents had no case on the record, as they had plead performance, and the petitioner had in its affirmative defense plead specifically that respondents had not paid the second and third premiums, which was admitted by the demurrer to this affirmative defense. The circuit court of appeals held this defense not good, because petitioner had not alleged that it had served the statutory notice, which was a condition precedent to its defense of non-payment. The circuit court of appeals, after careful deliberation, on reason and authority, held this point not well taken. This court in its opinion never mentioned this point. Did not the circuit court of appeals have a right to and was it not its duty to assume by the silence of this court it impliedly affirmed it? This court, in all fairness to the litigants and to the court of appeals, would certainly expect the court of appeals and litigants to so regard its silence on that point. If that be true, we say it was binding on the circuit court of appeals to so regard the point and refuse to open it up for further review. If the circuit court of appeals should in reason so regard the silence of this court, it certainly was its duty to follow its former ruling. Could it fairly and as reasonable men regard this court's silence in any other way?

The mistake petitioner makes in arguing this point is in undertaking to apply the rule and practice which prevails in appellate courts in considering a case from a *nisi prius* court, whose decisions never are final. That is not the case. When this court was reviewing the decision of the court of appeals it was reviewing the decision of an appellate court,

upon whom the doctrine of the *law of the case* applied and whose next decision would presumptively be final. This court could not decide the case or review the decision of the court of appeals on the theory or assumption that either party could again remove it here as a matter of right. Neither party had as a matter of law any such right of review. This court in such a case could not pass over a point without deciding it on the assumption that if the circuit court of appeals re-erred it would naturally come here again for further review. Yet this court would expect the court of appeals to err again, if it erred at first, if this court did not correct it. So the rule that would prevail as between this court and a *nisi prius* court would not as between this court and a circuit court of appeals. Nor is it the practice of appellate courts in reviewing the decision of a *nisi prius* court to leave undecided questions which must or probably will again come up on retrial, especially if the disposition of them will necessarily end the case. The practice is just the contrary. This is well illustrated by the case of Oleson *vs.* N. P. R. R. Co., 119 Fed., 77.

"The circuit court upon the second trial (106 Fed., 298) so understood it, and upon deciding the motion for a new trial remarked: 'Under no circumstances should I feel warranted, upon a second trial, in departing from the course pursued in the former trial, where that course had been a ground of objection on appeal, and in respect to which this court, if not sustained, had at least not been overruled nor criticised.' We think the trial court was justified in regarding the decision of this court as settling the law of the case for its guidance upon a second trial, and, if so, it was not error to follow it, nor are we now required to enter upon a consideration of the grounds upon which the former opinion of this court was based."

If any other rule prevails, what becomes of the points decided by the circuit court of appeals which are not reversed by this court? Must the circuit court of appeals act upon the theory that if it is reversed on one point it is reversed

on all points? Certainly not; that would be an absurd conclusion.

If it is not reversed on certain points, must it again listen to argument on those same points, go again into the examination of those points at the suggestion or caprice of contending counsel, but certainly with no different result? If not, what must it do? It certainly ought to conduct its business on the theory that it is an appellate court; that points of law once decided by it are conclusive upon it; that it is no more incumbent upon it to again examine a question once decided by it than any other appellate tribunal, unless in the meantime it has been reversed by this court. Must it, contrary to the rule prevailing in every appellate court, examine, re-examine, examine again *ad infinitum* questions once clearly and fairly decided by it because, forsooth, it has been reversed on one point by the United States Supreme Court?

No other rule than the one for which we are contending is a safe or sensible one. No good argument can be advanced against it. On the contrary, the orderly administration of the practice in the circuit court of appeals, the saving of costs and expense to the litigants, the saving of time and trouble to this court, to the lower court, and to the circuit courts of appeals all demand it.

We think that when this court removes a case here from the circuit court of appeals by writ of certiorari, reverses it on one of a dozen points raised and urged in both courts and passes over the other eleven points in silence, by every rule of implication it affirms the circuit court of appeals; that the lower court, the circuit court of appeals, is justified in so regarding its silence; that the circuit court of appeals cannot with proper regard for its own decisions refuse to follow its decisions on points upon which it is not reversed or criticised. We have not the slightest doubt but that this court acted on this rule when it wrote the former decision in this case. An implied affirmance is just as binding on a court

as a direct affirmance, if it is clearly shown. The only difference is that one cannot be denied, the other rests on natural presumption from the facts of the case. We have only been able to find one case where this question has been discussed, where the question was the controlling effect of the first decision of an appellate court upon a second hearing when the first decision had been reviewed by a higher appellate court. It reaches the same result as the circuit court of appeals, as follows:

"It will not be necessary for us to make any further statement of the case or the facts therein than will be found in our former opinion, except only so far as there has been some little change of the facts and status of the case. The questions as to the sufficiency of the allegations of the petition and of the contract were passed on by this court when the case was formerly here, and when the case went to the Supreme Court no objection was found to that part of the opinion, and, as far as this court is concerned, these questions are *res adjudicata*, and we will refer to our former opinion for our decision on those points."

Kannake Co. *vs.* Crane Bros., 38 Ill. App. Cs., 555.

The following may be of some aid:

The court of appeals of Kentucky (Penticost *vs.* Ins. Co., 61 S. W., 29) states the rule in this language:

"We have on this appeal the identical case which was decided on the former appeal. Every point suggested and every argument now made could have been made at that time; and under a rule of long standing in this court the law as announced in that opinion is the law of this case. For the reasons indicated, the judgment is affirmed."

The synopses of the following cases may be of service to the court on this point:

"Where the same question was presented a second time, the appellee should have relied on the prior decision as *res judicata*."

Masterson *vs.* Chicago, R. I. & P. R. Co., 58 Mo. App., 572.

In Texas & P. R. Co. *vs.* Anderson, 149 U. S., 237; 37 L. Ed., 717, it was held that the "circuit court of appeals cannot review by writ of error a judgment of the circuit court made in compliance with the mandate of the U. S. Supreme Court."

Matters necessarily involved in the determination of a question on appeal are settled by the decision when the same are again presented on a subsequent appeal.

So the decision upon a prior appeal where the question presented on a second appeal was necessarily involved in the prior decision.

Hutchinson *vs.* Chicago R. R. Co., 41 Wis., 541.

And where the same questions were necessarily involved and the conclusions declared could not have been reached without either expressly or impliedly deciding such questions.

Ferguson *vs.* Smith, 104 Ind., 246.

And where the same question must have been considered upon the prior appeal.

Millbank *vs.* Jones, 51 N. Y. S. R., 616.

And where the same questions were expressly or by necessary implication decided on the first appeal.

McKinney *vs.* State, Nixon, 117 Ind., 26.

And where the same question was involved in the prior decision, although not discussed in such decision.

Joslin *vs.* Cowee, 50 N. Y., 626.

And where the same question was directly and expressly or by implication and in substance disposed of by such appeal.

Camden *vs.* Werninger, 7 W. Va., 528.

And where the same question was involved, although the case was reversed upon another question.

Adams *vs.* Fisher, 75 Tex., 657.

And where the prior decision was by the supreme court on a question reversed by the superior court, and the same question was involved or should have been presented.

New Haven & No. Co. *vs.* State, 44 Conn., 376.

And where the error alleged occurred prior to the former appeal. All errors not assigned will be considered as waived and cannot afterwards be urged.

Union Mut. Life Ins. Co. *vs.* Kirchoff, 149 Ill., 536.

And where the same question was involved and it was said that matters once determined could not be reopened, and this was true whether actually adjudicated or not. If they could have been adjudicated in that suit they were settled.

Carter *vs.* Hough, 80 Va., 503.

We think we have clearly demonstrated that the decision of the circuit court of appeals on the first hearing, on points not reversed or criticised by this court, was the law of the case on the second hearing in the circuit court of appeals. If that be true, it follows that the decision of the circuit court of appeals on those points is likewise the law of the case in this court. This court would not send this or any other case back to the lower court and leave points binding on it or the circuit court of appeals and not likewise binding on this court. Those courts would not be bound to do one thing and this court free to do another, when it had the opportunity to correct the matter on the first hearing. This court, we doubt not, had this matter in mind when the case was before it. We have no doubt, as we have argued, that this court intended that the circuit court of appeals

should understand and act on the assumption that it affirmed it on all points on which it was silent. When such is the declared rule of this court it will be easy for litigants and the lower courts and circuit courts of appeals to determine just what had become the law of the case. Any other rule will work inextricable confusion.

If this is true, every point now raised and urged has been disposed of, because they were all decided on the first hearing in favor of respondents.

We ask the court to affirm the decision of the circuit court of appeals.

S. WARBURTON.

EBEN SMITH,

HAROLD PRESTON,

Of Counsel.

EXHIBIT A.

OLYMPIA, WASHINGTON, *January 25th*, 1904.

This is to certify that I, the undersigned, am the official reporter of the decisions of the supreme court of the State of Washington; that I have examined the record and briefs in the case of Ella W. Griesemer, plaintiff and respondent, *vs.* The Mutual Life Insurance Company of New York, defendant and appellant, reported in 10 Washington, page 202.

The record shows that the case was tried in the lower court before the judge, without jury, who made his findings of fact and conclusions of law. In finding number "second" the court set out a copy of the policy, which, among other things, contained the following provision:

"Notice that each and every such payment is due at the date named in the policy is given and accepted by the delivery and acceptance of this policy, and any further notice required by any statute, is hereby expressly waived."

The same facts appear in reference to the case of Ella W. Griesemer, administratrix. On page 20 of appellant's brief in the first case mentioned this notice was set forth *in hæc verba*, and it was argued as follows:

"If the parties had the power to agree that the laws of New York should govern the contract, they certainly had the power to declare at the same time how far said contract should be subject to said laws."

In the reply brief, under point VII, pages 13–21, inclusive, the appellant argues in favor of the validity of the waiving clause above suggested, citing Insurance Co. *vs.* Curry, 13 Bush., 312; Des Mazes *vs.* Mutual Benefit Life Insurance Company, 7 Insurance Law Journal, 926; Endlich upon Interpretation of Statutes, sec. 444; Maxwell on Interpretation of Statutes, sec. 348.

On page 14, reply brief, appellant uses this language:

"The respondents contend that the clause in the policy waiving the law was absolutely nugatory."

"It is a familiar principle of statutory law that a person may waive the advantage of a statute which is solely for his benefit, providing that in doing so, he violates no public right or does not infringe upon public policy."

ARTHUR REMINGTON,
Official Reporter of the Decisions of the Supreme Court of the State of Washington.

I, C. S. Reinhart, clerk of the supreme court of the State of Washington, hereby certify that Arthur Remington is the official reporter of the decisions of the supreme court of the State of Washington; that I have read the foregoing statement by Arthur Remington and have compared the same with the records in said cases in so far as he undertakes to set forth copies of the records and briefs in said cases, and certify that each and all of said statements are correct copies of the official record and briefs filed in said cases.

Witness my hand and official seal this 25th day of January, A. D. 1904.

[Seal of the Supreme Court, State of Washington.]

C. S. REINHART,
Clerk of the Supreme Court of the State of Washington.

15704

Supreme Court of the United States.

No. 166.—October Term, 1903.

The Mutual Life Insurance Company of New York, Petitioner, *vs.* Eliza Maud Hill, George E. Hill, Ellen Kellogg Hill, and Eugene C. Hill, by his Guardian ad litem, Eben Smith.	On writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[April 4, 1904.]

On April 28, 1886, George D. Hill, at Seattle, Washington, signed a written application to the Mutual Life Insurance Company of New York (hereinafter called the insurance company) for a policy of $20,000. The application was forwarded to the home office. The insurance company accepted the application, executed a policy and forwarded it to its local agent at Seattle, who there, on June 12, 1886, received the first premium and delivered the policy to Hill. The beneficiary named in the policy was Ellen K. Hill, the wife of the applicant. She died on February 14, 1887, leaving four children, the present defendants in error. A premium receipt for the second annual premium was in 1887 forwarded to the local agent at Seattle, presented by him to Hill, and not paid. No subsequent premiums were paid, and on December 4, 1890, Hill died.

Thereafter this action was commenced in the Circuit Court of the United States for the District of Washington. The contention of the plaintiffs is that, although the annual premiums for 1887, 1888, 1889 and 1890 had not been paid, the insurance company was nevertheless indebted to them for the full amount of the policy and interest, by reason of the fact that it had failed to give the notice of forfeiture prescribed by chapter 341, Laws 1876, as amended by chapter 321, Laws 1877, of the State of New York. The complaint set out a copy of the policy, alleged the payment of the first annual premium, the death of the insured and the relationship of the plaintiffs to the beneficiary. The defendant relied upon the non-payment of the premiums other than the first, and an abandonment of the contract. A demurrer to these defenses was sustained and a judgment entered for the plaintiffs, which was affirmed by the Court of Appeals for the Ninth Circuit. (97 Fed. Rep. 263; 38 C. C. A. 159.) A writ of certiorari was issued by this court, (176 U. S., 683,) the judgment reversed and the case remanded for further proceedings. (178 U. S. 347.) An amended answer and a replication were then filed by leave of the Circuit Court. A trial was had before the court and a jury, which resulted

in a verdict and judgment for the plaintiffs. This judgment was affirmed by the Court of Appeals, (118 Fed. Rep. 708; 55 C. C. A. 536,) and the case was again brought here on certiorari. (188 U. S. 742.)

Mr. Justice BREWER delivered the opinion of the Court.

A preliminary matter is this: When the case was here before we held that upon the record there was disclosed an abandonment of the insurance contract, by both the insured and the beneficiaries, and on that ground the judgment was reversed. It is now contended that "the only question left open by the mandate of this court was a submission of this question;" that our decision was substantially an adjudication that the plaintiffs had a right to recover unless it was shown that there had been an abandonment of the insurance contract, and that upon this trial it was shown that there had been no such abandonment, the insured having always expressed a wish to continue the policy, the beneficiary named in the policy having died before the second premium became due, and her children, who became entitled thereafter as beneficiaries, being minors and in actual ignorance of its existence. That decision was based upon the averments of the pleadings, and these pleadings were amended after the judgment was reversed and the case returned to the trial court. Clearly the contention of the plaintiffs is not sustainable. When a case is presented to an appellate court it is not obliged to consider and decide all the questions then suggested or which may be supposed likely to arise in the further progress of the litigation. If it finds that in one respect an error has been committed so substantial as to require a reversal of the judgment, it may order a reversal without entering into any inquiry or determination of other questions. While undoubtedly an affirmance of a judgment is to be considered an adjudication by the appellate court that none of the claims of error are well founded—even though all are not specifically referred to in the opinion—yet no such conclusion follows in case of a reversal. It is impossible to foretell what shape the second trial may take or what questions may then be presented. Hence the rule is that a judgment of reversal is not necessarily an adjudication by the appellate court of any other than the questions in terms discussed and decided. An actual decision of any question settles the law in respect thereto for future action in the case. Here, after one judgment on the pleadings had been set aside, on amended pleadings a trial was had, quite a volume of testimony presented and a second judgment entered. That judgment is now before us for review, and all questions which appear upon the record and have not already been decided are open for consideration.

Previous decisions in kindred cases have established these propositions: First, the State of Washington was the place of the contract. (*Equitable Life Assurance Society* v. *Clements*, 140 U. S. 226, 232; *Mutual Life In-*

surance Company of New York v. *Cohen*, 179 U. S. 262.) Second, the statutory provision of the State of New York in reference to forfeitures has no extra-territorial effect, and does not of itself apply to contracts made by a New York company outside of that State. (*Mutual Life Insurance Company of New York* v. *Cohen, supra.*) Third, parties contracting outside of the State of New York may by agreement incorporate into the contract the laws of that State and make its provisions controlling upon both parties, provided such provisions do not conflict with the law or public policy of the State in which the contract is made. (*Equitable Life Assurance Society* v. *Clements, supra*; *Mutual Life Insurance Company of New York* v. *Cohen, supra.*) If it were necessary, other cases from this and State courts might be cited in support of these propositions. Applying them, it follows that, as Washington was the place of the contract, the laws of that State control its terms and obligations, unless the parties thereto have stipulated for some other laws. Such a stipulation, it is insisted, is found in this contract. In determining the effect of such a stipulation it must be borne in mind that the applicability of other laws than those of the State of the place of contract is a matter of agreement, and that the agreement may select laws and also limit the extent of their applicability. The case is precisely like one in which the parties, without mentioning laws or State, stipulate that the contract shall be determined in accordance with certain specified rules.

This insurance policy contains these recitals:

"In consideration of the application for this policy, which is hereby made a part of this contract, the Mutual Life Insurance Company of New York promises to pay at its home office in the city of New York, unto Ellen Kellogg Hill, wife of George Dana Hill, of Seattle, in the county of King, Washington Territory, for her sole use, if living, in conformity with the statute, and if not living, to such of the children of their bodies as shall be living at the death of the said wife, or to their guardian for their use, twenty thousand dollars; upon acceptance of satisfactory proofs at its said office, of the death of the said George Dana Hill during the continuance of this policy, upon the following condition; and subject to the provisions, requirements, and benefits stated on the back of this policy, which are hereby referred to and made part thereof;

"The annual premium of eight hundred and fourteen dollars and —— cents shall be paid in advance on the delivery of this policy, and thereafter to the company at its home office in the city of New York, on the twenty-ninth day of April in every year during the continuance of this contract.

* * * * * *

"Payment of premiums.—Each premium is due and payable at the home office of the company in the city of New York; but will be accepted elsewhere when duly made in exchange for the company's receipt, signed by the president or secretary. Notice that each and every such payment is due at the date named in the policy, is given and accepted by the de-

livery and acceptance of this policy, and any further notice required by any statute is thereby expressly waived.

* * * * * *

"Paid-up policy.—After three full annual premiums have been paid upon this policy, the company will, upon the legal surrender thereof before default in payment of any premium, or within six months thereafter, issue a paid-up policy, payable as herein provided for the amount required by the provisions of the act of May 21, 1879, chap. 347, Laws of the State of New York."

In the application are these provisions:

"If said policy be issued, the declarations, agreements, and warranties herein contained shall be a part thereof; and the contract of insurance when made shall be held and construed at all times and places to have been made in the city of New York.

* * * * * *

"4th. Policyholders must not expect to be notified when their premiums will be due. It is a practice of the company to send these notices, as reminders when the address is known, but no responsibility is assumed on the part of the company in consequence of their non-reception."

The statute of New York, relied upon as controlling, forbids the forfeiture of any life insurance policy unless "a written or printed notice stating the amount of such premium or interest due on such policy, the place where said premium or interest should be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is assured, or the assignee of the policy, if notice of the assignment has been given to the company, at his or her last known post office address, postage paid by the company, or by an agent of such company or person appointed by it to collect such premium. Such notice shall further state that unless the said premium or interest then due shall be paid to the company or to a duly appointed agent or other person authorized to collect such premium within thirty days after the mailing of such notice, the said policy and all payments thereon will become forfeited and void."

Now to what extent were the statutes of New York made by these stipulations controlling? It is stated in the application that the contract of insurance is to "be held and construed at all times and places to have been made in the city of New York." It might with some plausibility be contended that this general provision is limited to the matter which precedes it in the same sentence, to wit, the "declarations, agreements and warranties herein contained." This contention is reinforced by the fact that elsewhere in the contract there is special mention of one statute of New York, to wit, chap. 347, Laws 1879, which is made controlling in reference to a single matter.

But assuming that the general declaration that the contract is to be held and construed to have been made in the city of New York, would, if there was nothing else, make controlling all the applicable statutes

of that State, it is limited by other express agreements of the policy. Among these are that "notice that each and every such payment is due at the date named in the policy is given and accepted by the delivery and acceptance of this policy, and any further notice required by any statute is thereby expressly waived," and also that "policyholders must not expect to be notified when their premiums will be due. It is a practice of the company to send these notices, as reminders when the address is known, but no responsibility is assumed on the part of the company in consequence of their non-reception." Language could not be clearer to the effect that the party accepting the policy admits thereby the receipt of every notice in respect to the payment of premium which can be implied from any other part of the policy or required by any statute. The contention is that this express stipulation in reference to notice is nullified by the general provision that the contract is to be construed to have been made in the city of New York. It is urged that the laws of New York control in the construction of any contract made in that State, that they require notice as a condition of forfeiture and forbid a waiver of such notice, and therefore that the agreement in the policy in respect to notice is overthrown by the law of the State. But that assumes that the contract was made in New York, whereas it was in fact made in Washington, and the laws of New York are controlling in any respect only because the parties have so stipulated, and, as we have indicated, the stipulation in respect thereto is to be harmonized with the other stipulations in the contract. The ordinary rule in respect to the construction of contracts is this: that where there are two clauses in any respect conflicting, that which is specially directed to a particular matter controls in respect thereto over one which is general in its terms, although within its general terms the particular may be included. Because when the parties express themselves in reference to a particular matter the attention is directed to that, and it must be assumed that it expresses their intent, whereas a reference to some general matter, within which the particular may be included, does not necessarily indicate that the parties had the particular matter in thought. Here, when the parties stipulate that no other notice shall be required, attention is directed to the particular matter of notice. When the stipulation is that the contract shall be construed to have been made in New York, no particular statute is referred to, and the attention may not be directed to the matter of notice or any other special feature of New York law. The special controlled the general; that which must have been in the minds of the contracting parties controls that which may not have been, although included within the language of the latter stipulation. This is the general rule in the construction of all documents—contracts as well as statutes. (*Bock* v. *Perkins*, 139 U. S. 628, and cases cited; *Rodgers* v. *United States*, 185 U. S. 83, and cases cited; *Winebrenner* v. *Forney*, 189 U. S.

148; Sedgwick on the Construction of Statutes and Constitutional Law, 2d ed. p. 360 and note; 2 Parsons on Contracts, 6th ed. p. 501 and note.)

Obviously the express stipulation in the policy as to the matter of notice must be held paramount and to that extent limiting the provision of the New York law in reference to notice which was not specially referred to in the contract, and can be invoked only because it is one of the various statutes of New York applicable to insurance policies.

Beyond the proposition that by the terms of the policy the insured was bound to take notice of the time when the payment of the second premium was due, it was also shown by the testimony that the renewal receipt was forwarded to the local agent at Seattle and by him presented to the insured, so that there was notice in fact as well as notice implied from a receipt of the policy. Under those circumstances the insured failed to pay, and continued such failure for four years prior to his death. Yet, notwithstanding his failure to perform his part of the contract—and performance by the insured underlies the obligation of the insurance company to perform on its part—this action was brought to compel the same performance by the company that would have been due if he had performed. It is simple justice between two parties to a contract containing depending stipulations that neither should be permitted to exact performance by the other without having himself first performed. It is true cases arise in which one party is enabled to take advantage of some statutory provision and exact compliance from the other without having himself first complied, and courts may not ignore the scope and efficacy of such statutory provisions, but, nevertheless, a judgment for failure to perform against one party in favor of the other, when the latter was the first delinquent, is offensive to the sense of righteousness and fair dealing. We have had before us a series of cases coming from the same jurisdiction in which, when the insured had for a series of years neglected to pay their insurance premiums or perform their parts of the insurance contract their heirs or beneficiaries have, on their deaths, sought to obtain judgments against the insurance company for the amounts which would have been due on the policies if the insured had performed their stipulations in respect to the payment of premiums. Courts have always set their faces against an insurance company which, having received its premiums, has sought by technical defences to avoid payment, and in like manner should they set their faces against an effort to exact payment from an insurance company when the premiums have deliberately been left unpaid. We cite with approval the decision of the Supreme Court of Washington in a recent case, *Lone, Administrator*, v. *The Mutual Life Insurance Company of New York*, decided December 21, 1903, and reported in 74 Pac. Rep. 689, in which, as in this case, the insured made payment of one premium and then lived years without making further payment, and in which

the court said, in reference to the New York statute here relied upon, and the conduct of the insured:

"The statute, it is true, provides that no life insurance company shall have power to declare forfeited or lapsed any policy by reason of the non-payment of any annual premium, unless notice be given in a specified manner, but a statute must be construed, and its provisions enforced, with reference to its objects; and the legislature, taking into consideration the infirmities of memory, enacted this statute for the purpose of preventing insurance companies from taking what, in homely phrase, is termed 'snap judgment' on its patrons, thereby depriving them of the benefit of contracts by reason of slight negligence on their part, and when there was no real intention to rescind—a beneficent and just law if enforced in the spirit of its enactment, but oppressive and unjust if construed with narrow and literal exactness.

* * * * * *

"We are satisfied that the thought never occurred to Rex during his lifetime that he had a claim against this company on the policy which had been issued so many years before, or, if he did, after the lapse of any appreciable time, it was a dishonest thought, for he knew that he had not performed the duties which devolved upon him under the contract, and that he had no rights thereunder; and there seems to be no just reason why his administrator should demand rights which he had virtually waived. In *Shutte* v. *Thompson*, (15 Wall. 151,) where a party was standing upon his statutory right in relation to the notice concerning depositions, the court said that it was not doubted that all the provisions of the statute respecting notice to the adverse party could be waived by him; that a party could waive any provision either of a contract or of a statute intended for his benefit; and that, if a course of action on his part had misled the other party, he ought not to be allowed to avail himself of his original rights, because under such circumstances he would be availing himself of what was substantially a fraud, and that he should not be allowed to reap any advantage from his own fraud.

* * * * * *

"From every consideration of justice and fair dealing, we think the respondent should not be allowed to recover in this case."

The judgments of the Circuit Court and of the Circuit Court of Appeals will be reversed, and the case remanded to the Circuit Court with instructions to set aside the verdict and grant a new trial and to proceed further in accordance with the views expressed in this opinion.

Mr. Justice PECKHAM took no part in the consideration and decision of this case.

True copy.

Test:

Clerk Supreme Court, U. S.